

No. 10874

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JOSEPH P. BOYLE and EDWARD HAFT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Montana

FILED

NOV - 6 1944

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

MR. EARLE N. GENZBERGER,

Butte, Montana,

Attorney for Appellants and Claimants  
and Intervenors.

MR. JOHN B. TANSIL,

Attorney of the United States in and for the  
District of Montana,  
Billings, Montana, and

MR. R. LEWIS BROWN,

Assistant Attorney of the United States in and  
for the District of Montana,  
Butte, Montana,

Attorneys for Appellee and Libelant.

[1\*]

In the District Court of the United States in and  
for the District of Montana  
Butte Division

No. 110

UNITED STATES OF AMERICA,

Libelant,

v.

406 Bottles of Distilled Liquor,

Libelee.

Be It Remembered that on May 25, 1943, the Libel of Information for Condemnation of the Libelant United States of America was filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.] [2]

**LIBEL OF INFORMATION FOR  
CONDEMNATION**

The United States of America in its own right, by R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, brings this libel of information for condemnation against the libelee above named in a civil cause for the forfeiture and condemnation of certain distilled liquors as hereinafter set forth because of a violation of the Internal Revenue Laws of the United States, and upon information and belief alleges as follows:

**I.**

That this Court has jurisdiction of the subject matter hereof by reason of the provisions of Section 3723(a), Title 26, United States Code.

## II.

That on the 20th day of April, 1943, there was seized on land, at the Atlas Bar, at 137 East Park Street, in the city of Butte, county of Silver Bow, state and district of Montana, and within the jurisdiction of this court, by certain officers of the Internal Revenue of the United States, specially authorized by the Commissioner of Internal Revenue of the United States, 406 bottles of distilled liquor consisting of whiskey, brandy, rum and gin, and containing 60.9 proof gallons of alcohol, more or less, because of certain violations of the Internal Revenue Laws of the United States, as follows:

[3]

## III.

That by virtue of the provisions of Subdivision (j), Section 2800, Title 26, U. S. C., there became due and payable on the 1st day of November, 1942, a floor stocks tax of \$2.00 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon upon all distilled spirits upon which the Internal Revenue tax imposed by law had been paid and which on the said 1st day of November, 1942, were held and intended for sale.

## IV.

That on the said 1st day of November, 1942, the premises at 137 East Park Street, in the city of Butte as aforesaid, were used and occupied as a saloon and a place where distilled spirits, upon which such Internal Revenue tax aforesaid was imposed, were held, intended for sale and sold for

beverage purposes, and that such business was being carried on under the name of the Atlas Bar.

## V.

That on the said 20th day of April, 1943, certain Internal Revenue officers of the United States as aforesaid went into the said premises at 137 East Park Street, known as the Atlas Bar, and found therein and upon the said premises certain distilled spirits, in bottles, on which the above named tax was imposed and upon which the said tax had not been paid, and in addition found therein and in the said place or building certain other quantities of distilled spirits, in bottles, and that such of the said distilled spirits, in bottles, upon which the said tax had been imposed and which had not been paid, and which were in the said Atlas Bar on the said 20th day of April, 1943, were there kept, maintained and had for the purpose of being sold or removed by the owners thereof and the persons [4] operating the said business in fraud of the Internal Revenue Laws of the United States, or with design to avoid payment of the said taxes so levied and assessed upon such distilled spirits, and that by reason thereof and of the provisions of Section 3720, Title 26, U. S. C., such distilled liquors and all other distilled liquors in the said place or building became subject to seizure and forfeiture to the United States and the same and the whole thereof were immediately seized by the said officers of the Internal Revenue of the United States and taken into their possession and custody and that the same now

is in their said possession and custody at Butte, Montana,

Wherefore, in consideration of the premises, your libelant prays that all of said distilled spirits so seized, consisting of 406 bottles of distilled spirits as aforesaid may be proceeded against for forfeiture and condemnation in accordance with the Internal Revenue Laws of the United States and to this end this Honorable Court may issue process in due form according to the course of this court in cases of admiralty and maritime jurisdiction, and that all persons, firms, and corporations having or pretending to have any right, title or interest or claim in and to said distilled spirits above mentioned may be cited to appear herein and answer all and singular the premises aforesaid, and that if they cannot be found they may be cited to appear by process of publication in the manner provided by law.

That by an appropriate order this Honorable Court may adjudge and decree that the said 406 bottles of distilled spirits, particularly described and mentioned, be declared forfeited and condemned at the suit of this libelant according to the Internal Revenue Laws of the United States, and that the same be by this [5] Court directed to be turned over and delivered to the United States and its proper officers for its use, and that your libelant have a decree for costs against the owners or holders of the said distilled spirits condemned

and such further order or other relief or judgment as the nature of the case may require.

R. LEWIS BROWN

Assistant Attorney for the  
United States, in and for  
the District of Montana.

[6]

United States of America,  
District of Montana—ss.

R. Lewis Brown, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant Attorney of the United States, in and for the District of Montana, and as such makes this verification to the foregoing Libel of Information for Condemnation; that he has read the said Libel of Information for Condemnation and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

R. LEWIS BROWN

Subscribed and sworn to before me this 24th day of May, 1943.

[Seal]

HAROLD L. ALLEN

Deputy Clerk, United States  
District Court, District of  
Montana.

[Endorsed]: Filed May 25, 1943, C. R. Garlow,  
Clerk. [7]

That on June 3, 1943 the Notice of Seizure was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [8]

PROOF OF PUBLICATION

State of Montana,  
County of Silver Bow—ss.

Clarence E. Blewett, being first duly sworn, deposes and says that he is the Principal Clerk of the Montana Labor News, a newspaper of general circulation published at the City of Butte, in Silver Bow County, State of Montana; that the notice of which a copy is hereto attached was first published in its issue of May 27, 1943, and was published in its issue of May 27, 1943, the last publication thereof being in the issue dated the twenty-seventh day of May, 1943.

CLARENCE E. BLEWETT  
Principal Clerk.

(Here appears printed Notice of Seizure—omitted to avoid unnecessary duplication.) First publication May 27, 1943—1T.

Subscribed and sworn to before me this 28th day of May, 1943.

[Notarial Seal] FRANK L. RILEY,  
Notary Public for the State of Montana, residing  
at Butte, Montana.

My commission expires Jan. 8, 1946. [9]

[Title of District Court and Cause.]

### NOTICE OF SEIZURE

Notice Is Hereby Given that a libel of information for condemnation has been filed by the above named libelant in the above entitled Court and cause:

That by order of Court there has been seized on land at Butte, in the county of Silver Bow, and within the state and district of Montana, the following, to-wit:

406 Bottles of Distilled Liquor;

That said libelant prays in said libel of information for condemnation that the above described distilled liquor be condemned and forfeited to the United States of America upon the following grounds:

That this Court has jurisdiction of the subject matter hereof by reason of the provisions of Section 3723(a), Title 26, United States Code.

That on the 20th day of April, 1943, there was seized on land, at the Atlas Bar, at 137 East Park Street, in the city of Butte, county of Silver Bow, state and district of Montana, and within the jurisdiction of this court, by certain officers of the Internal Revenue of the United States, specially authorized by the Commissioner of Internal Revenue of the United States, 406 bottles of distilled liquor consisting of whiskey, brandy, rum and gin, and containing 60.9 proof gallons of alcohol, more or less, because of certain violations of the Internal Revenue Laws of the United States, as follows:

That by virtue of the provisions of Subdivision (j), Section 2800, Title [10] 26, U. S. C., there became due and payable on the 1st day of November, 1942, a floor stocks tax of \$2.00 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon upon all distilled spirits upon which the Internal Revenue tax imposed by law had been paid and which on the said 1st day of November, 1942, were held and intended for sale; that on the 1st day of November, 1942, the premises at 137 East Park Street, in the city of Butte, as aforesaid, were used and occupied as a saloon and a place where distilled spirits, upon which such Internal Revenue tax aforesaid was imposed, were held, intended for sale and sold for beverage purposes, and that such business was being carried on under the name of the Atlas Bar; that on the said 20th day of April, 1943, certain Internal Revenue officers of the United States as aforesaid, went into the said premises at 137 East Park Street, known as the Atlas Bar, and found therein and upon the said premises certain distilled spirits, in bottles, on which the above named tax was imposed and upon which the said tax had not been paid, and in addition found therein and in the said place or building certain other quantities of distilled spirits, in bottles, and that such of the said distilled spirits, in bottles, upon which the said tax had been imposed and which had not been paid, and which were in the said Atlas Bar on the said 20th day of April, 1943, were there kept, maintained and had for the pur-

pose of being sold or removed by the owners thereof and the persons operating the said business in fraud of the Internal Revenue Laws of the United States, or with design to avoid payment of the said taxes so levied and assessed upon such distilled spirits, and that by reason thereof and of the provisions of Section 3720, Title 26, U. S. C., such distilled liquors and all other distilled liquors in the said place or building became subject to seizure and forfeiture to the United States and the same and the whole thereof were immediately seized by the said officers of the Internal Revenue of the United States and taken into their possession and custody and that the same now is in their said possession and custody at Butte, Montana. [11]

That no libel of information for condemnation has been instituted under the Internal Revenue Laws of the United States of the said distilled spirits hereinbefore described, in any court of competent jurisdiction and that the proceedings herein are the only proceedings instituted and pending in said matter;

Notice Is Further Given that, by order of Court, all libeleeis herein named and all persons, firms and corporations having or claiming any interest in said distilled spirits, or having anything to say why the same should not be condemned and forfeited, appear and file their respective answers, claims and defenses to such libel of information for condemnation, setting forth their interest in or claims to said distilled spirits libeled, with the

Clerk of the above named court at Butte, Montana, on or before the 11th day of June, 1943.

Dated this 25th day of May, 1943.

E. LIEBERG

United States Marshal for  
the District of Montana.

By PAUL J. ERLER  
Deputy Marshal

[Endorsed]: Filed June 3, 1943, C. R. Garlow,  
Clerk. [12]

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That on June 2, 1943, the Claim and Intervention of Owners and Answer to Libel of Edward Haft and Joseph P. Boyle (also called J. P. Boyle and Joe Boyle), as co-partners doing business under the name of "Atlas Bar" was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [13]

CLAIM AND INTERVENTION OF OWNERS  
AND ANSWER TO LIBEL

To The Honorable James H. Baldwin, Judge of  
The District Court of the United States For  
The District of Montana:

Come now Edward Haft and Joseph Boyle (also called J. P. Boyle and Joe Boyle), as co-partners doing business under the name of "Atlas Bar," and intervene herein as the owners and claimants of the above-named libelee, to-wit: 406 bottles of

distilled liquors; and file this, their answer to the libel of information for condemnation heretofore filed herein, and allege:

### I.

That they are, each and both, residents of Butte, in the State and District of Montana, and are engaged in business as the "Atlas Bar" at 137 East Park Street, Butte, Montana, and at such place of business are retail liquor dealers, duly licensed by the United States to engage in such business and to sell intoxicating liquor at retail.

### II.

Admit the allegations of paragraphs I, III and IV of said libel.

### III.

Answering paragraph II of the said libel, these claimants admit that on the 20th day of April, 1943, there was seized on land, at the Atlas Bar, 137 East Park Street, in the City of Butte, County of Silver Bow, State and District of Montana, and within the jurisdiction of this Court, by said officers of the United States, 406 bottles of distilled liquors, consisting of whiskey, brandy, rum and gin, and containing 60.9 proof gallons of alcohol, more or less; and deny each and every other allegation [14] of said paragraph II.

### IV.

Denies each and every allegation contained in paragraph V of said libel.

## V.

Further answering said paragraphs II, III and V of said libel, these answering claimants deny that any of the liquors seized by the agents of the United States Government, the libelant herein, on April 20, 1943, at 137 East Park Street, Butte, Montana, was subject to any unpaid internal revenue taxes of any kind, character or description, and allege the fact to be that all taxes had been paid on each and every one of the 406 bottles of distilled liquors named as libelee herein.

By way of first affirmative defense, and in propounding its claim of ownership, these claimants and intervenors allege:

## I.

That they are, each and both, residents of Butte, in the State and District of Montana, and are engaged in business as the "Atlas Bar" at 137 East Park Street, Butte, Montana, and at such place of business are retail liquor dealers, duly licensed by the United States to engage in such business and to sell intoxicating liquor at retail.

## II.

That at all times herein mentioned one D. E. Deneen was the agent in charge of the alcoholic tax unit for the District of Montana, acting under the direction and jurisdiction of Lewis Penwell, Collector of Internal Revenue for the District of Montana; and that the acts hereinafter described

were done and performed by D. E. Deneen and his deputies and assistants, as an agent in charge of the alcoholic tax unit for the District of Montana, purporting to act under Sec. 3720, Title 26, U. S. C.

[15]

### III.

That heretofore at Butte, in the State and District of Montana, said D. E. Deneen did enter upon the premises of these petitioners, at 137 East Park Street, Butte, Montana; and without search warrant, or warrant of any kind, and without authority of law, did take from the possession of these interveners, 406 bottles of distilled liquors, containing 60.9 proof gallons of alcohol, more or less, as follows:

*United States of America*

15

Proof	Trade Name	½ Pints	Pints	Fifths	Quarts	Proof Gallons
86.8	Kinsey .....	...	...	72	...	12.10
84	Roma Brandy .....	...	60	...	...	10.60
84	Swiss Colony Brandy .....	...	6	...	...	.63
86	J. B. Cella Brandy .....	2	...	...	...	.11
80	Mint Springs .....	...	2	...	...	.30
90	Boston Dry Gin .....	8	...	...	...	.45
100	Old Grand Dad .....	...	6	...	...	.75
70	Boston Sloe Gin .....	...	...	1	1	.14
160	Old Taylor Whiskey .....	...	6	...	...	.75
86.8	Kinsey Whiskey .....	...	5	...	...	.87
100	Old Grand Dad .....	...	...	1	1	.25
86.8	Kinsey Whiskey .....	...	5	...	...	.87
70	Blackberry Brandy .....	2	...	...	...	.18
84	Roma Brandy .....	...	1	...	...	.17
86.8	Kinsey Whiskey .....	...	1	...	...	.17
86.8	Kinsey Whiskey .....	...	1	...	...	.17
84	Roma Brandy .....	...	2	...	...	.34
86	Sevilla Rum .....	...	2	...	...	.34
86.8	Kinsey Whiskey .....	...	4	...	...	.69
80	Mint Springs .....	...	2	...	...	.20
80	Mint Springs .....	...	6	...	...	.60
70	Boston Blackberry Brandy .....	...	3	3	...	.26

Proof	Trade Name	$\frac{1}{2}$ Pints	Pints	Fifths	Quarts	Proof Gallons
86.8	Kinsey Whiskey .....	...	...	1	...	.17
80	Cavalier Gin .....	...	13	...	...	1.30
90	Seagrams 5 Crown .....	...	3	...	...	.34
86.8	Seagrams .....	1	...	...	...	.05
84	Roma Brandy .....	...	5	...	...	.84
84	Swiss Colony Brandy .....	...	2	...	...	.21
90	Boston Gin .....	36	...	...	...	2.03
100	Old Taylor Whiskey .....	...	5	...	...	.63
100	Old Grand Dad .....	...	3	...	...	.38
86	Sevilla Rum .....	...	4	...	...	.69
100	Old Grand Dad .....	...	6	...	...	.75
86.8	Kinsey Whiskey .....	...	120	...	...	20.8
84	Roma Brandy .....	...	1	...	...	.1
100	Old Grand Dad .....	...	...	...	1	.25
86	Sevilla Rum .....	...	1	...	...	.1
86.8	Philadelphia Whiskey .....	...	1	...	...	.1
80	Cavalier Gin .....	...	1	...	1	.2
Total .....						60.9

## IV.

That these claimants were, on the 20th day of April, 1943, the owners and in possession of all of the distilled liquors last [16] above described, and on April 20, 1943, and at all times herein mentioned, were and have been duly authorized by the United States Government to sell such liquors at retail.

## V.

That all Federal taxes on each and every one of said bottles of intoxicating liquors, or distilled spirits, had been paid in full long prior to April 20, 1943, the date of seizure; and that none of said liquor, at the time of seizure, on April 20, 1943, or at 137 East Park Street, was contraband in the sense that no Federal tax had been paid thereon.

## VI.

That these intervenors had paid the floor tax imposed by the Internal Revenue Act of 1942 on such of said liquors as was in the possession of these intervenors on November 1, 1942; and that all of such liquors as were purchased subsequent to said date were purchased by these intervenors from the Montana Liquor Store, owned and operated by the State of Montana, and at the times of said respective purchase said liquors, and all thereof, had had the Federal tax paid thereon.

## VII.

That all of said bottles bear internal revenue stamps, showing the tax thereon to have been paid,

with the exception of wines, if any, which show the tax receipts and tax stamps upon the original packages.

### VIII.

That no just or legal cause existed on April 20, 1943, for the seizure or withholding from these intervenors of said property; and that these intervenors now are, and at the time of said seizure and at all times since the respective dates of the purchase of said liquors have been, the legal owners of each and all of said bottles of liquor; and these intervenors were in physical possession of said bottles of liquor at their said place of [17] business from the respective dates of the purchase of said liquors, up until the time of the seizure thereof by said D. E. Deneen, as aforesaid.

### IX.

That at the time and place of said seizure, said D. E. Deneen and his deputies also took from the possession of these intervenors, and now withhold, all invoices, receipts for taxes paid, and all bills and other receipts, and other evidences of purchases and tax transactions then in possesion of these intervenors; and said D. E. Deneen and his deputies still withhold and retain said papers relating to the business of these intervenors, from these intervenors.

### X.

That these intervenors are entitled to the immediate return of said property above described.

Whereof These Intervenors and Answering Claimants Pray: That said libel of information for condemnation be dismissed; that this Honorable Court decree a restitution of the aforesaid property to them; and that this Honorable Court make such other and further order and decree as right and justice may determine in the premises.

EARLE N. GENZBERGER

Proctor and Attorney for Intervenors and Answering Claimants, Edward Haft and Joseph P. Boyle (also called J. P. Boyle and Joe Boyle).

United States of America, *District of America*, L State of Montana, County of Silver Bow—ss.

Edward Haft and Joseph P. Boyle (also called J. P. Boyle and Joe Boyle), being first duly sworn, each for himself, depose and say: That they are the intervenors and answering claimants named in the foregoing claim and intervention of owners and answer the libel; that they have read the foregoing answer, know the contents thereof, and that the matters and things therein [18] stated are true to their own knowledge.

EDWARD HAFT

JOE P. BOYLE

Subscribed and sworn to before me this 1st day of June, 1943.

[Notarial Seal] EARLE N. GENZBERGER  
Notary Public for the State of Montana, residing  
at Butte, Montana.

My commission expires 9/14/43.

Service of the foregoing claim and intervention of owners and answer to libel acknowledged and copy thereof received this 3rd day of June, 1943.

.....

United States Attorney.

R. LEWIS BROWN

Asst. United States Attorney.

[Endorsed]: Filed June 2, 1943, C. R. Garlow,  
Clerk. [19]

---

That on June 3, 1943 the Warrant of Arrest and Monition was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [20]

**WARRANT OF ARREST AND MONITION**

The President of the United States of America.  
To the Marshal of the United States for the District  
of Montana, Greeting;

1. Whereas a libel of information for condemnation has been filed in the above entitled court and action on the 25th day of May, 1943, by the United States of America, as libelant, against the above captioned libellees, which said distilled liquors are now in the possession of the officers of the Internal Revenue of the United States, at the Federal Building, Butte, Montana, and claimed as forfeited to the United States for a violation of the Internal Revenue Laws of the United States, which said

libel of information for condemnation prays the usual process and monition of said Court in that behalf to be made, and that all persons, firms or corporations claiming any interest in said distilled liquors may be cited to answer or claim in the premises, and all proceedings be had, that said distilled liquors may, for the causes in said libel of information for condemnation set forth, be condemned and forfeited to the United States of America.

2. You Are, Therefore, Directed and Commanded Hereby to arrest and take the property described in the caption hereof, into your possession for safe custody and to attach the same and to detain said distilled liquors in your custody until the further [21] order of this Court regarding the same, and to give notice of such seizure, to all libelee above named and to all persons, firms and corporations claiming the same, or knowing or having anything to say why the same should not be condemned at the suit of said libellant, pursuant to the prayer in said libel of information for condemnation contained, and that they be cited to file with the Clerk of this Court, at the city of Butte, state and district of Monana, their answers or claims to said libel of information for condemnation, setting forth their interest or claims to the distilled liquors so libeled, if any they have, on or before the 11th day of June, 1943, which date is made, by order of Court, the return day hereon and the time within which answers or claims must be filed.

Said notice shall contain the substance of said

libel of information for condemnation and shall state the return day so ordered and you shall cause the same to be published by one publication in a newspaper of general circulation, published at or near the place of seizure, to-wit: The Montana Labor News, a newspaper of general circulation, published at Butte, Montana, and by posting a copy of said notice in the most public manner at or near the place of trial, to-wit: Butte, Montana, said publication and proclamation to be printed and posted at least fourteen days prior to said return day; and what you shall have done in the premises do you then make return thereon, together with this writ.

Witness the Honorable James H. Baldwin, Judge of the above named court, in the city of Butte, within the said state and district of Montana, this 25th day of May, 1943.

[Seal]

C. R. GARLOW

Clerk, United States District  
Court for District of Mon-  
tana.

By HAROLD L. ALLEN  
Deputy Clerk

[Endorsed]: Filed June 3, 1943. [22]

That on June 3, 1943 the Marshal's Return on Warrant of Arrest and Monition was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [23]

MARSHAL'S RETURN

United States of America,  
District of Montana—ss.

I hereby certify and return that I received the within Warrant of Arrest and Monition on the 25th day of May, 1943 and executed the same, as follows:

That I attach the following described property, to wit: 406 bottles of distilled liquor consisting of whiskey, brandy, rum and gin on the 25th day of May, 1943, at Butte, Montana and on said date appointed I Paul J. Erler took possession thereof and are now in my custody.

That I served copies of the Warrant of Arrest and Monition, Libel of Information, and Notice of Seizure herein on . . ., libelee, above named, on the . . . day of . . ., at . . ., Montana.

That I caused said Notice of Seizure, setting forth the substance of the Libel of Information herein to be published in one weekly issues of the Montana Labor News, a newspaper of general circulation published at Butte, Silver Bow County, Montana, at least fourteen days prior to the return day fixed by order of Court herein, publisher's affidavit being hereto attached and made a part of this return.

That I posted a copy of said Notice of Seizure in the most public manner at Lobby of Post Office in

the city of Butte, Montana, on the 25th day of May, 1943.

The original Notice of Seizure and the receipt of the custodian above named is attached hereto and made a part of this return.

Dated this 26th day of May, 1943.

E. LIEBERG,

U. S. Marshal for the District  
of Montana.

By PAUL J. ERLER  
Deputy.

United States Marshal's Fees: Expenses Publi-  
cation \$10.08.

[Endorsed]: Filed June 3, 1943, C. R. Garlow,  
Clerk. [24]

---

That on June 7, 1943 the Reply of the Libelant United States of America was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [25]

### REPLY

Comes now the libelant above named, the United States of America, and for its reply to the first affirmative defense of the intervenors Edward Haft and Joseph P. Boyle contained in their claim and intervention to the libel of information and deny and allege as follows:

### I.

Admit the allegations set out and contained in

Paragraphs I, II, and IX on the said first affirmative defense.

## II.

Admit that heretofore officers and agents of the Alcohol Tax Unit, acting under the direction of D. E. Denneen, did enter upon the premises at 137 East Park Street, Butte, Montana, and without a search warrant or a warrant of any kind did take from the possession of the intervenors the bottles of distilled liquor described in Paragraph III of the said first affirmative defense, and deny all of the other matters, things and allegations contained in said paragraph.

## III.

Admit that on the 20th day of April, 1943, the said liquor, as described in Paragraph III of the said first affirmative defense, was in the possession of the intervenors and allege that the libelant does not know whether or not the intervenors were on said day the owners of said liquor, and allege that on April 20, 1943, and at all times since said time, [26] the said intervenors have been in the possession of a retail liquor dealers' stamp issued to them by the libelant and deny that the said intervenors on said day or at any time subsequent to the first day of November, 1942, were duly authorized by the United States government, or authorized by the United States government at all, to sell the liquor described in Paragraph III of the said first affirmative defense at retail, and as alleged in Paragraph IV of the said first affirmative defense.

## IV.

Deny the matters, things and allegations contained in Paragraphs V, VI, VII, and X of the first affirmative defense of the intervenors.

## V.

Admit that the intervenors were in physical possession of the bottles of liquor at their place of business from the respective dates of the purchase of said liquor to the date of the seizure of the same; allege that it is without knowledge as to whether or not the intervenors are the legal owners of the said bottles of liquor and deny all of the other matters, things and allegations set out and contained in Paragraph VIII of the said first affirmative defense.

Wherefore, the libelant, having fully replied, renews the prayer for the relief set out and contained in its libel of information for condemnation on file herein.

R. LEWIS BROWN

Assistant Attorney of the  
United States, in and for  
the District of Montana.

[27]

United States of America,  
District of Montana—ss.

R. Lewis Brown, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant Attorney of the United States, in and for

the District of Montana, and as such makes this verification to the foregoing Reply; that he has read the same and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

R. LEWIS BROWN

Subscribed and sworn to before me this 7th day of June, 1943.

[Seal] HAROLD L. ALLEN

Deputy Clerk, United States  
District Court for the Dis-  
trict of Montana.

Acknowledgment of Service, June 7th, 1943.

EARLE N. GENSBERGER  
Attorney for Intervenors

[Endorsed]: Filed June 7, 1943. C. R. Garlow,  
Clerk. [28]

That on August 27, 1943 an Entry was made in the Minutes of said District Court concerning request herein for setting of matter for trial in the words and figures following, to-wit: [29]

[Title of the District Court.]

40th day May Term 1943 Friday, August 27, 1943.

10:00 A. M. Court convened pursuant to  
Adjournment

Present: Honorable James H. Baldwin, Judge.

\* \* \*

No. 110

United States vs. 406 Bottles of Distilled Liquor

At this time Mr. Earle N. Genzberger, attorney for Edward Haft and Joseph P. Boyle, requested the Court to set this matter for trial sometime during the month of September, whereupon Court stated that the matter would not be heard in September, but that it may be set for sometime in October.

\* \* \*

Court thereupon adjourned until 10 A. M. tomorrow.

C. R. GARLOW,  
Clerk. [30]

That on December 13, 1943, the Order Setting Case For Trial was filed and entered herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [31]

**ORDER SETTING CASE FOR TRIAL**

It is ordered, and this does order:

1. That this case be and the same is hereby set for trial before the Court, at the court room thereof, in the city of Butte, in the state and district of Montana, at Ten o'clock in the morning on Tuesday, December 21, 1943; and,
2. That the Clerk of the above-entitled Court forthwith notify the parties litigant, by mail, of the making of this order.

Done in open court at Butte, Montana, December 13, 1943.

JAMES H. BALDWIN

United States District Judge,  
District of Montana

[Endorsed]: Filed and Entered Dec. 13, 1943.  
C. R. Garlow, Clerk. [32]

That on December 21, 1943 the Motion To Compel Production was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [33]

**MOTION TO COMPEL PRODUCTION**

To the Honorable James H. Baldwin, Judge of the above-entitled Court.

Come now the intervenors and claimants, Joseph P. Boyle and Ed Haft, and move the above-entitled court for an order compelling the libelant to produce in Court the thirteen pints of Cavalier Gin and one quart of Cavalier Gin described in Exhibit "3" introduced in evidence in this case, and also to produce in Court and at the hearing of this action the liquor store sales slips, invoices receipts for taxes paid, and all bills and other receipts, and other evidences of purchases and tax transactions, seized by the officers of the libelant from these claimants and intervenors on April 20th, 1943 at 137 East Park St., Butte, Montana, as alleged in Paragraph IX of the first affirmative defense of the intervenors herein and admitted in Paragraph I of the Reply herein.

**EARLE N. GENZBERGER**

Attorney for Intervenors and  
Claimants

Service of the foregoing Motion acknowledged and copy thereof received this 21st day of December, 1943.

R. LEWIS BROWN

Assistant U. S. Attorney,  
Attorney for Libelant.

[Endorsed]: Filed Dec. 21, 1943. C. R. Garlow,  
Clerk. [34]

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That on December 21, 1943 an Entry was made in the Minutes of said District Court concerning the proceedings had on the trial herein in the words and figures following, to-wit:

[Title of the District Court.]

14th Day October Term 1943

Tuesday, December 21, 1943.

10:00 A. M. Court Convened pursuant to order  
Present: Honorable James H. Baldwin, Judge.

No. 110

United States vs. 406 Bottles of Distilled Liquor

This cause was duly called for trial at 10 A. M. this day, Mr. R. Lewis Brown, Assistant United States District Attorney, was present and appeared for the United States, and there was no appearance by the claimants and owners, nor by counsel in their behalf.

Thereupon Mr. Brown stated that he desired to call to the attention of the Court the fact that an

offer in compromise has been made herein, and that it is now under consideration by the Attorney General.

Thereupon Court ordered that a recess be taken until 10:30 A. M. when the trial of the cause will be proceeded with.

Thereafter, at 10:30 A. M., counsef for the respective parties were present in Court, Mr. R. Lewis Brown, Assistant United States District Attorney, appearing for the United States and Mr. Earle N. Genzberger, Attorney, appearing for the claimants and owners, Edward Haft and Joseph P. Boyle.

Thereupon Mr. Genzberger stated to the Court that an offer in compromise has been made in this case and that he did not think that the case would be tried until the offer had been disposed of, and now moved the Court to continue the trial of this case until next Monday morning at ten o'clock. Thereupon Court stated that the motion for continuance should have been made in writing and noticed for hearing, and that the trial of this case will not now be continued.

Thereupon Neil D. McCarthy was sworn and examined as a witness for the United States, and a certain Return of Floor Stocks Tax on Distilled Spirits, etc., signed by Edward Haft, Partner and sworn to on November 25, 1942, marked as Plff's Exhibit No. 1 was offered and received in evidence without objection.

Thereupon John H. Cosgriff was sworn and examined as a witness for the United States and Plff's Exhibit No. 2, being a duplicate of Plff's Ex-

hibit No. 1, was offered and received in evidence without objection.

Thereupon Mr. Genzberger asked that the seized liquor herein be produced in Court and admitted in evidence for examination by the Court, to which request the government objected. Thereupon Court ordered that the request be denied, and the exception of the claimants and owners to the ruling of the Court was duly noted.

Thereupon Court ordered the record to show that no request by subpoena or by order of Court for the production of the liquors was made, and that if the parties desired proof of this kind they should have served on the person having the liquor in charge a subpoena duces tecum.

Thereupon a certain inventory of the liquors seized by Agent John H. Cosgriff on April 20, 1943, marked as Defts. Exhibit No. 3 was offered and received in evidence without objection.

Thereupon Edward H. Donovan and Stephen Sullivan were sworn and examined as witnesses for the United States. Thereupon Mr. Brown offered in evidence the Claim and Intervention of Owners and Answer to Libel, filed herein, to which offer the claimants and owners objected, whereupon the offer was withdrawn by Mr. Brown. Thereupon W. S. Manley was sworn and examined as a witness [36] for the United States, whereupon the United States rested.

Thereupon the claimants and owners herein filed and presented to the Court a motion to dismiss the

libel of information and to refuse condemnation upon the grounds set forth in said motion, whereupon said motion was argued by counsel, submitted and by the Court denied. The exception of the claimants and owners to the ruling of the Court was duly noted.

Thereupon the claimants and owners filed and presented to the Court a motion to compel production in Court the 13 pints and 1 quart of Cavalier Gin, described in Exhibit 3, and certain liquor store sales slips, invoices, etc., mentioned in the motion, to which the government objected as not timely made. Thereupon Court ordered that the motion be and is denied, to which ruling of the Court the claimants and owners excepted and exception duly noted.

Thereupon Joseph P. Boyle, John J. Walsh and T. D. McGarry were sworn and examined as witnesses for the claimants and owners. A certain work sheet of the witness McGarry, from which exhibits 1 and 2 were made, and a certain inventory of liquors handed to McGarry by the witness John J. Walsh, were marked as Defts. Exhibits 4 and 5, respectively, but were not offered in evidence.

Thereupon Mr. Genzberger stated that his next witness is Edward Haft; that said witness is not now present, and that the claimants and owners have no other witnesses. Thereupon Court ordered that the Marshal call the said witness Edward Haft three times at the door, which was done, and said

witness failed to appear or respond. Thereupon Mr. Genzberger stated that the witness Haft is now on his way here from Missoula, and moved the Court to take a recess until 4:30 this afternoon or to continue the trial of the cause until ten o'clock tomorrow morning, which motion was by the Court denied. Thereupon the government announced that it rested.

Thereupon Court ordered the record to show that it appearing from an inspection of the record that on the 13th day of December 1943, this proceeding was set for trial before the Court here at ten o'clock in the morning on this day; that it appears from the statement of the attorney for the claimants that he had knowledge of the setting six days ago; that he made no effort to secure the attendance of the witness Haft by subpoena; that when the case was called for trial this morning the claimants each failed to appear, as did their attorney; that for their convenience the Court continued the trial until ten thirty o'clock in the morning on this day; that at the conclusion of the Government's case at 11:55 this morning, counsel for the claimants stated definitely in court that unless the Court would continue the case until ten o'clock tomorrow he would have to stall the case through the afternoon to secure the attendance of the witness Haft; that the Court then stated to counsel there would be no stalling of the trial of the case in this court, that this case would be tried as other cases and that the neglect of the parties to appear to protect their own interests would not justify the

Court in continuing the trial of the case for the convenience of the litigant who neglected his own interest when it was not made to appear to the Court by the record or in any other way that the testimony of the witness Haft, if here, would have any material bearing on any issue in this proceeding. We will let the record stand as it is made.

Thereupon Mr. Genzberger asked that an exception be noted, and the Court stated that you are entitled to an exception.

Thereupon Mr. Genzberger asked that the letter of Assistant United States Attorney Allan, dated Dec. 16, 1943, be placed in the record, to which the Government objected.

Thereupon Court ordered the record to show that at this time the claimant Joseph P. Boyle, also known as J. P. Boyle and Joe Boyle, and the claimant Edward Haft having announced through their attorney, Mr. Earle N. Genzberger, that they have not at this time any further evidence to produce, and the government having stated that it had no rebuttal to offer, the matter is considered by the Court as submitted for decision and judgment, and upon that submission the Court finds the facts to be as follows: at all of the times hereinafter mentioned the claimants Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, were co-partners doing business under the firm name and style of the Atlas Bar in those certain premises located at 137 East Park Street in the city of Butte, in the county of Silver Bow, in the [37] state and

district of Montana, as retail dealers in alcoholic liquors. On April 20, 1943, there was seized on land at the Atlas Bar, 137 East Park Street, in the city of Butte, county of Silver Bow, state and district of Montana, and within the jurisdiction of this court, by certain officers of the Internal Revenue service of the United States of America, specially authorized by the Commissioner of the Internal Revenue of the United States of America, 406 bottles of distilled liquor consisting of whiskey, brandy, rum and gin, and containing sixty and nine-tenths proof gallons of alcohol, more or less, because of certain violations of the Internal Revenue laws as follows: that by virtue of the provisions of sub-division (j) of Section 2800 of Title 26 of the United States Codes there became due and payable on the first day of November, 1942, a floor stocks tax of \$2 on each proof gallon and a proportionate tax at a like rate on all fractional parts of each proof gallon upon all distilled spirits upon which the internal revenue tax imposed by law had been paid, and which on the first day of November, 1942, was held and intended for sale; that the liquor hereinbefore referred to is specifically described in paragraph 3 of the first affirmative defense set out in the claim and intervention of Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, and Edward Haft, filed herein on June 2, 1943; that all of the liquor so seized and specifically described was on November 1, 1942, held by the claimants Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, as co-partners doing business under the name of Atlas Bar and by

them and each of them intended for sale at that time, and at all of the times thereafter the premises at 137 East Park Street in the city of Butte, as aforesaid, were used and occupied by the claimants Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, as a saloon and a place where distilled spirits upon which the internal revenue tax of the United States was imposed were held, intended for sale and sold for beverage purposes, and that such business was carried on under the name and style of the Atlas Bar at all of said times. On April 20, 1943, certain internal revenue officers of the United States of America went into the said premises at 137 East Park Street, in the city of Butte, in the state and district of Montana, known as the Atlas Bar, and found therein and upon the said premises certain distilled spirits in bottles on which the above-named floor tax was imposed and upon which the said floor tax had not been paid, and in addition found therein and in the said place of business certain other quantities of distilled spirits in bottles and that such of said distilled spirits in bottles on which said floor tax had been imposed had not been paid and which were then in said Atlas Bar at said address on the said 20th day of April, 1943, were there kept, maintained and had by the claimants Edward Haft and Joseph P. Boyle, also known as J. P. Boyle and Joe Boyle, for the purpose of being sold and removed by said last named persons who were then and there the owners thereof, and the persons operating the said business, in

fraud of the Internal Revenue laws of the United States of America, and with design to avoid payment of the floor tax levied and assessed upon such distilled spirits, and that by reason thereof and the provisions of Section 3720 of Title 26 of the United States Codes, such distilled liquor and all other distilled liquors in the place of business specifically described in said paragraph 3 of the first affirmative defense of the claimants Joseph P. Boyle, also called J. P. Boyle and Joe Boyle and Edward Haft, filed herein on June 2, 1943, became subject to seizure and forfeiture to the United States of America, and the same and the whole thereof were immediately seized by the said officers of the Internal Revenue of the United States and taken into their possession and custody and that the same now are in their possession and custody at Butte, Montana.

The Court finds generally each and all of the issues presented by the pleadings on file herein in favor of the libelant and against the libellee and the claimants Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, and Edward Haft, and from the facts so found the Court concludes as a matter of law that this Court has jurisdiction of this proceeding, the subject matter, the libelant, the libellee, and said Edward Haft and Joseph P. Boyle, [38] also called J. P. Boyle and Joe Boyle, and that the libelant is entitled to all of the relief prayed for in its libel of information for condemnation filed herein on May 25, 1943. Proper forms of written findings of fact and conclusions of law and judgment

will be presented to the Court for signature and filing.

Court thereupon suspended until such time as the further business of the Court shall require it to again resume.

C. R. GARLOW,

Clerk.

By H. H. WALKER,

Deputy. [39]

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That on December 21, 1943 an exhibit marked Plaintiff's Exhibit No. 1 was admitted in evidence on behalf of the Libelant United States of America upon the trial herein in the words and figures following, to-wit: [40]

## PLAINTIFF'S EXHIBIT No. 1

[In pencil]: 228.51

[Stamp]: X 2 Dec 1942

To be prepared in Triplicate

Original

First Read Carefully Instructions Furnished by the Collector of Internal Revenue

Date Received by Collector	Form 758 Treasury Department U. S. Internal Revenue (Revised 1942)	To Be Filed in by the Collector List Dec 2 1942 ..... Amount due ..... Amount paid .....  Amount assessed ..... Cheeked by .....
Received With Remittance Nov 30 1942 Helena, Montana Collector Internal Revenue		\$ \$228.51 \$228.51 ----- -----

Return of Floor Stocks Tax on Distilled Spirits, Malt Liquors, and Wines

Under the Revenue Act of 1942

Name of Taxpayer: Charles Montrey, Joe Boyle, Edward Haft (The Atlas)  
(Give last name first)Place of Business: 137 East Park Street  
(Street)  
Butte, Montana  
(City or town) (State)Class of Business: Retail Liquor Dealer  
(To be filled in by Taxpayer)  
To Collector of Internal Revenue at—  
Helena, Montana  
(city) (state)  
(To be filled in by the Collector when blanks  
are distributed)

## Plaintiff's Exhibit No. 1—(Continued)

The following, together with the accompanying inventory is a full and true return of all distilled spirits, malt liquors, and wines of any description which were on \*November 1, 1942 (the date specified in the Revenue Act of 1942 for the imposition of the floor stocks tax), owned by the above-named taxpayer and held at the place named above, or stored elsewhere, or in transit to or from such taxpayer, and intended for sale or for use in the manufacture or production of any article intended for sale, and of the floor stocks tax due thereon:

\*Date to be inserted by person executing this return. Such date will be found in the Collector's instructions which were mailed with this form.

Commodity (A)	Quantity (B)	Rate of Tax (C)	Amount of Tax (D)
1. Distilled spirits (proof gallons) .....	112.28872	2.00	\$224.58
2. Malt liquors (barrels) .....	3.335	1.00	3.33
3. Wines containing 14% alcohol or less (gallons) .....	2.20	.10	.22
4. Wines containing 14% to 21% alcohol (gallons) .....	3.75	.....	.38
5. Wines containing 21% to 24% alcohol (gallons) .....	.....	.....	.....
6. Champagne and sparkling wines (1/2 pints or fractions thereof) .....	.....	.....	.....
7. Artificially carbonated wines (1/2 pints or fractions thereof) .....	.....	.....	.....
8. Total tax due (total of lines 1 to 7) .....	.....	.....	\$228.51

Plaintiff's Exhibit No. 1—(Continued)

*United States of America*

43

I solemnly swear (or affirm) that the foregoing, together with the accompanying inventory), is a true and correct return of all the distilled spirits, malt liquors, and wines subject to the floor stocks tax as provided by the Revenue Act of 1942, and that the amount of tax returned covers all the liability incurred by the person, firm, or corporation, named above, on distilled spirits, malt liquors, and wines on the day specified, to the best of my knowledge and belief.

Sworn and subscribed to before me this 25th  
day of November, 1942.

[Seal] JOHN J. WALSH

Notary Public for the State of Montana, Resid-  
ing at Butte, Montana.  
My Commission Expires February 26th, 1943

(Signed) EDWARD HAFT

Partner  
(State whether individual owner, member of firm, or, if  
officer of corporation, give title)

Joe Boyle, Charles Moutrey, and Edward Haft  
Atlas Bar

137 East Park Street

Butte, Montana

Retail Liquor Dealer Stamp No. 167749

## Plaintiff's Exhibit No. 1—(Continued)

Century Club	.....	14	.....	3.5000	90%	3.1500
"	Pt.	25	.....	3.1250	90	2.8125
Cream of Kentucky	.....	13	.....	1.6250	86	1.3975
"	1/2 Pt.	61	.....	3.8125	86	3.2787
Kessler	.....	6	.....	1.2000	85	1.0200
"	Pts.	15	.....	1.87500	85	1.5938
"	1/2 Pt.	64	.....	4.0000	85	3.4000
Old Sunnybrook	.....	12	.....	3.0000	90.4	2.7120
"	Pt.	52	.....	6.5000	90.4	5.8760
"	1/2 Pt.	58	.....	3.625	90.4	3.2770
Old Taylor	.....	2	.....	.5000	100	.5000
"	Pt.	31	.....	3.8750	100	3.8750
Old Grandad	.....	18	.....	4.5000	100	4.5000
"	Pt.	62	.....	7.7500	100	7.7500
Old Oscar Pepper	.....	12	.....	2.4000	86	2.0640
"	Pt.	37	.....	4.6250	86	3.9775
"	1/2 Pt.	42	.....	2.625	86	2.2575
Old Hermitage	.....	9	.....	2.2500	90.4	2.0340
Old Crow	.....	2	.....	.5000	100	.5000
Black & White	.....	2	.....	.4000	86.8	.3472
Mint Springs	.....	16	.....	2.000	80	1.6000

Plaintiff's Exhibit No. 1—(Continued)

Mint Springs	.....	1/2 Pt.	53	.....	3.3125	80
Old Harbor	.....	Pt.	32	.....	4.000	80
"	.....	1/2 Pt.	40	.....	2.5000	80
Barclay's	.....	Qt.	36	.....	9.000	80.6
"	.....	Pt.	23	.....	2.8750	80.6
"	.....	1/2 Pt.	36	.....	2.2500	80.6
Royal Oak	.....	Qt.	10	.....	2.5000	80.6
"	.....	Pt.	27	.....	3.3750	80.6
"	.....	1/2 Pt.	53	.....	3.3125	80.6
Old Mr. Boston Gin	.....	Qt.	3	.....	.7500	90
"	.....	Pt.	24	.....	3.0000	90
"	.....	1/2 Pt.	16	.....	1.0000	90
Pembrook's Gin	.....	1/2 Pt.	27	.....	1.6875	90
Rittenhouse Rye	.....	1/2 Pt.	4	.....	.8000	100
Ronna Brandy	.....	Fifth	11	.....	2.2000	84
Sevilla Rum	.....	Fifth	22	.....	4.4000	86
Seagram's	.....	Fifth	19	.....	3.8000	86.8
"	.....	Pt.	8	.....	1.0000	86.8
"	.....	1/2 Pt.	10	.....	.6250	86.8
Old Mr. Boston Gin	.....	1/2 Pt.	48	.....	3.000	90
Cavalier Gin	.....	1/2 Pt.	12	.....	.7500	85
Diplomat	.....	Pt.	24	.....	3.0000	100

## Plaintiff's Exhibit No. 1—(Continued)

Montrose .....	Pt.	23	.....	2.8750	86	2.4725
" .....	1/2 Pt.	48	.....	3.0000	86	2.5800
<u>Padre Port Wine</u> .....	Qt.	3	.....	7500	20%	
<u>Roma Muscatel</u> .....	Qt.	4	.....	1.0000	20%	
Roma Port Wine .....	Gallon	2	.....	2.0000	20%	
Roma Claret Wine .....	Fifth	11	.....	2.2000	13%	
17 Cases Pts. Beer	1.2342	1 Case Qts.	.0967 and two barrels	2.000		
Total beer	3.333					

## BEER

WINE	Quantity	Wine Gallons	WINE	Quantity	Wine Gallons	BEER	Barrels
Padre Port Wine	Qt.	3	.7500	20%	17 cases pints	12 ounces	1.2342
Roma Muscatel	Qt.	4	1.0000	20%	1 Case quarts	32 ounces	.0967
Roma Port	Gallon	2	2.0000	20%	2 barrels		2.0000
Roma Claret Wine Fifth	11	3.7500					
		2.2000	13%				
							3.3309

That on December 21, 1943 an exhibit marked Plaintiff's Exhibit No. 2 was admitted in evidence on behalf of the Libelant United States of America upon the trial herein in the words and figures following, to-wit:

# PLAINTIFF'S EXHIBIT No. 2

[In pencil] : 228.51

To be prepared in Triplicate

Duplicate

First Read Carefully Instructions Furnished by the Collector of Internal Revenue

Date Received by Collector	Form 758 Treasury Department U. S. Internal Revenue (Revised 1942)	To Be Filled in by the Collector List	Page	Line
Received with Remittance Nov 30 1942 Helena, Mont.	Dec 2 1942 .....	Dec 2 1942 .....	.....	5107
Collector Internal Revenue	Amount due .....	Amount due .....	.....	\$228.51
	Amount paid .....	Amount paid .....	.....	\$228.51
	Amount assessed .....	Amount assessed .....	.....	\$
	Checked by .....	Checked by .....	.....	.....

[Stamp] :  
Received  
Dec 14 1942

District Supervisor  
Alcohol Tax Unit  
Seattle, Wash.

[In pencil] :  
9 - Silver Bow

Return of Floor Stocks Tax on Distilled Spirits, Malt Liquors, and Wines

Under the Revenue Act of 1942

## Plaintiff's Exhibit No. 2—(Continued)

Name of Taxpayer: Charles Moutrey, Joe Boyle, Edward Haft (The Atlas)

(Give last name first)

To Collector of Internal Revenue at—

Place of Business: 137 East Park Street  
(street)  
Butte, Montana  
(City or town) (State)

To Collector of Internal Revenue at—  
Helena, Montana  
(City) (State)  
(To be filled in by the Collector when blanks  
are distributed)

Class of Business: Retail Liquor Dealer  
(To be filled in by Taxpayer)

“Audited [Illegible] 1-9-43”  
Clerk Date

The following, together with the accompanying inventory is a full and true return of all distilled spirits, malt liquors, and wines of any description which were on \*November 1, 1942 (the date specified in the Revenue Act of 1942 for the imposition of the floor stocks tax), owned by the above-named taxpayer and held at the place named above, or stored elsewhere, or in transit to or from such taxpayer, and intended for sale or for use in the manufacture or production of any article intended for sale, and of the floor stocks tax due thereon:

---

\*Date to be inserted by person executing this return. Such date will be found in the Collector's instructions which were mailed with this form.

## United States of America

## Plaintiff's Exhibit No. 2—(Continued)

Commodity (A)	Quantity (B)	Rate of Tax (C)	Amount of Tax (D)
1. Distilled spirits (proof gallons) .....	*112.887	112.28872	2.00 \$224.58 *225.78
2. Malt liquors (barrels) .....	*3.330	3.330	1.00 3.33V * 3.33
3. Wines containing 14% alcohol or less (gallons) .....	*2.20	2.20	.10-.02e* .22V *
4. Wines containing 14% to 21% alcohol (gallons) .....	*3.75	3.75	.10 .38 * .38
5. Wines containing 21% to 24% alcohol (gallons) .....	.....	.....	.....
6. Champagne and sparkling wines ( $\frac{1}{2}$ pints or fractions thereof) .....	.....	.....	.....
7. Artificially carbonated wines ( $\frac{1}{2}$ pints or fractions thereof) .....	.....	.....	.....
8. Total tax due (total of lines 1 to 7).....	.....	.....	.....
<hr/>			\$228.51

\*Figures in pencil.

I solemnly swear (or affirm) that the foregoing, together with the accompanying inventory, is a true and correct return of all the distilled spirits, malt liquors, and wines subject to the floor stocks tax as provided by the Revenue Act of 1942, and that the amount of tax returned covers all the liability incurred by the person, firm, or corporation, named above, on distilled spirits, malt liquors, and wines on the day specified, to the best of my knowledge and belief.

[In pencil]: (\$1.03 Short)

Sworn and subscribed to before me this 25th  
day of November, 1942.

[Seal]

JOHN J. WALSH

(Signed)

EDWARD HAFT

Notary Public for the State of Montana, Resid-  
ing at Butte, Montana.

My Commission Expires February 26th, 1943

(State whether individual owner, member of firm, or, if  
officer of corporation, give title)

Plaintiff's Exhibit No. 2—(Continued)

Joe Boyle, Charles Moutrey, and Edward Haft

Firm Name Atlas Bar

Address 137 East Park Street, Butte Montana

Retail Liquor Dealer Stamp No. 167749

Inventory of Tax Paid Distilled Spirits  
Branded held and intended for sale or  
Wines for use in the Manufacture of any Article intended for sale and de-  
clared subject to Federal Floor Stock Tax—~~October 1, 1941.~~  
Nov 1—1942

Kind	Number of Cases	Size of Bottle	Number of Bottles	Wines Case or Bottle	Gallons per Wine Gallons	Proof	Proof Gallons
Century Club .....		Qt.	14		3.5000	90%	3.1500 ✓
" .....		Pt.	25		3.1250	90	2.8125 ✓
Cream of Kentucky .....		Pt.	13		1.6250	86	1.3975 ✓
" .....		½ Pt.	61		3.8125	86	3.2787 ✓
Kessler .....		Pts.	6		1.2000	85	1.0200 ✓
" .....			15		1.87500	85	1.5938 ✓
Old Sunnybrook .....	Qt.	½ Pt.	64		4.0000	85	3.4000 ✓
" .....	Pt.		12		3.0000	90.4	2.7120 ✓
Old Sunnybrook .....	Pt.		52		6.5000	90.4	5.8760 ✓
" .....			58		3.625	90.4	3.2770 ✓

## Plaintiff's Exhibit No. 2—(Continued)

Kind	Number of Cases	Size of Bottle	Wines Gallons per Case or Bottle	Wine Gallons	Proof	Proof Gallons
Old Taylor .....	2	Qt.	.5000	100	.5000	✓
" .....	31	Pt.	3.8750	100	3.8750	✓
Old Grandad .....	18	Qt.	4.5000	100	4.5000	✓
" .....	62	Pt.	7.7500	100	7.7500	✓
Old Oscar Pepper.....	12	Fifth	2.4000	86	2.0640	✓
" .....	37	Pt.	4.6250	86	3.9775	✓
Old Hermitage .....	9	Qt.	2.625	86	2.2575	✓
Old Crow .....	2	Qt.	2.2500	90.4	2.0340	✓
Black & White .....	2	Fifth	.5000	100	.5000	✓
Mint Springs .....	16	Pt.	.4000	86.8	.3472	✓
" .....	53	1/2 Pt.	2.000	80	1.6000	✓
Old Harbor .....	32	Pt.	3.3125	80	2.6500	✓
" .....	40	1/2 Pt.	2.5000	80	2.000	✓
Barelay's .....	36	Qt.	9.000	80.6	7.254	✓
" .....	23	Pt.	2.8750	80.6	2.3173	✓
Royal Oak .....	36	1/2 Pt.	2.2500	80.6	1.8135	✓
" .....	10	Qt.	2.5000	80.6	2.0150	✓
" .....	27	Pt.	3.3750	80.6	2.7202	✓
" .....	53	1/2 Pt.	80.6	2.6699	✓	

Plaintiff's Exhibit No. 2—(Continued)

Joseph P. Boyle et al., vs.

Kind	Number of Cases	Size of Bottle	Number of Bottles	Gallons per Case or Bottle	Wines per Gallons	Proof	Proof Gallons
Old Mr. Boston Gin.....	3	Qt.	.7500	90	.6750	✓	
".....	24	Pt.	3.0000	90	2.7000	✓	
".....		1/2 Pt.	1.0000	90	.9000	✓	
Pembrook's Gin.....		1/2 Pt.	1.6875	90	1.5187	✓	
Bittenhouse Rye.....	4	Fifth	.8000	100	.8000	✓	
Roma Brandy.....	Fifth		2.2000	84	1.8480	✓	
Sevilla Rum.....	Fifth		4.4000	86	3.7840	✓	
Seagram's.....	Fifth		3.8000	86.8	3.2984	✓	
".....	Pt.	1.0000	86.8	.8680	✓		
Old Mr. Boston Gin.....	10	1/2 Pt.	.6250	86.8	.5425	✓	
Cavalier Gin.....	48	1/2 Pt.	3.000	90	2.7000	✓	
Diplomat.....		1/2 Pt.	.7500	85	.6375	✓	
Montrose.....	Pt.	3.0000	100	3.0000	✓		
".....	24	Pt.	3.0000	100	3.0000	✓	
Pache Port Wine.....	3	Qt.	.7500	20%			
Roma Muscatel.....	4	Qt.	1.0000	20%			
Roma Port Wine.....	2	Gallon	2.0000	20%			
Roma Claret Wine.....	11		2.2000	13%			
17 Cases Pts. Beer.....	1,234	1 Case Qts.	1,067 and two barrels	2,000			
Total beer.....	3,332						
		Total.....					
		[In pencil]:	112.8872				

## Plaintiff's Exhibit No. 2—(Continued)

Prepare in Duplicate—Attach Original Copy to Duplicate Copy of Federal Floor Tax Return Form  
 758. Retain Duplicate in File.

Certified Correct

.....  
 U. S. Storekeeper—Gauger By .....  
 A. T. U. Inspector Firm Name .....  
 Title .....

This Form Furnished by Courtesy of National Distillers Products Corporation

[Stamped on face of form]: Received With Remittance Nov 30, 1942 Helena, Mont. Collector  
 Internal Revenue

	WINE		BEER	
	Quantity	wine Gallons		Barrels
Padre Port Wine	Qt. 3	.7500	20% V	12 ounces 1.2342V
Roma Muscatel	Qt. 4	1.0000	20% V	32 ounces .0967V
Roma Port	Gallon 2	2.0000	20% V	2 barrels 2.0000V
				—————
Roma Claret Wine Fifth	11	3.75000	13% V	3.3309V
		2.2000		—————

That on December 21, 1943 an exhibit marked Defendant's Exhibit No. 3 was admitted in evidence on behalf of Intervenors and Claimants Edward Haft and Joseph P. Boyle upon the trial herein in the words and figures following, to-wit: [50]

#110 - Apr 24 3.

MONTANA LIQUOR CONTROL BOARD, L. D. SALES TICKETS.

Stora Hlo.

Purusha

That on December 21, 1943 an exhibit marked Defendant's Exhibit No. 3 was admitted in evidence on behalf of Intervenors and Claimants Edward Haft and Joseph P. Boyle upon the trial herein in the words and figures following, to-wit: [50]



That on December 21, 1943 the Motion To Dismiss of Intervenors and Claimants was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [52]

### MOTION TO DISMISS

Come now Edward Haft and Joseph P. Boyle, co-partners doing business as the Atlas Bar, intervenors and claimants herein and move the Court to dismiss the libel of information herein, and to refuse condemnation of the 406 bottles of distilled liquor seized herein on the ground and for the reason:

#### I.

That the proof by the libelant fails to sustain the allegations of the libel of information for condemnation herein.

#### II.

That the proof on behalf of the libelant fails to disclose that the floor tax levied by the Revenue Act of 1942 was not paid on any of the liquor described in the libel of information herein on the 20th day of April, 1943, the date of seizure.

#### III.

That the proof of the libelant discloses that all of the distilled spirits seized on April 20th, 1943, were at the time and place of seizure fully tax paid.

#### IV.

That the proof of the libelant herein rests upon speculation and conjecture and suspicion. [53]

## V.

That there is no just or legal cause shown herein for the seizure or withholding from these intervenors and claimants of the distilled spirits described in the information or libel herein.

EARLE N. GENZBERGER

Attorney for Intervenors and  
Claimants.

[Endorsed]: Filed Dec. 21, 1943. C. R. Garlow,  
Clerk. [54]

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That on December 23, 1943 an Entry was made in the Minutes of said District Court concerning the signing of written Findings of Fact and Conclusions of Law and the signing of Decree herein, and the direction of said District Court to file and enter said Findings of Fact and Conclusions of Law and to file, enter and docket said Decree, in the words and figures following, to-wit: [55]

[Title of District Court.]

15th day October Term 1943.

Thursday, December 23, 1943.

2:30 P. M. Court convened pursuant to order.

Present: Honorable James H. Baldwin, Judge.

No. 110

United States vs. 406 Bottles of Distilled Liquor.

Herein, the Court this day signed its written Findings of Fact and Conclusions of Law and ordered that the same be filed and entered of record.

Thereupon, a decree as presented by Mr. R. Lewis Brown, Assistant United States District Attorney, was signed by the Court and ordered filed, entered and docketed.

Court thereupon suspended until such time as the further business of the Court shall require it to again resume.

C. R. GARLOW,

Clerk

By H. H. WALKER

Deputy Clerk [56]

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That on December 23, 1943 the written Findings of Fact and Conclusions of Law and Order for Decree were filed and entered of record herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [57]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This matter having heretofore been set for trial by the Court for the 21st day of December, 1943, said cause came on regularly for trial before the Court on said day on the issues formed by the Libel of Information, and the Claim and Intervention of Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, co-partners, doing business under the name of Atlas Bar, and intervening herein because of their claim that they were and are the owners of the distilled liquors, the sub-

ject of the Libel of Information herein; the plaintiff was represented by R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, its attorney, and proctor, and the claimant and intervenor Joseph P. Boyle was present in court and the said claimants Edward Haft and Joseph P. Boyle were represented by their counsel and proctor, Mr. Earle N. Genzberger; thereupon oral and documentary evidence was introduced by and on behalf of the libelant and oral evidence introduced by and on behalf of the said claimants and intervenors Edward Haft and Joseph P. Boyle, and thereafter and upon the closing of the evidence the matter was submitted to the Court for decision and consideration and the Court being fully advised in the premises, makes and orders filed its Findings of Fact and Conclusions of Law as follows: [58]

## FINDINGS OF FACT

### I.

That at all of the times hereinafter mentioned the claimants Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, were co-partners doing business under the firm name and style of the Atlas Bar, in those certain premises located at 137 East Park Street, in the city of Butte, county of Silver Bow, state and district of Montana, as retail dealers in alcoholic liquors.

### II.

On April 20, 1943, there was seized on land at the said Atlas Bar, 137 East Park Street, in the

city of Butte, county of Silver Bow, state and district of Montana, and within the jurisdiction of this court, by certain officers of the Internal Revenue Service of the United States of America, specially authorized by the Commissioner of Internal Revenue of the United States of America, 406 bottles of distilled liquor, consisting of whiskey, brandy, rum and gin and containing 60.9 proof gallons of alcohol, more or less, because of certain violations of the Internal Revenue laws as follows:

That by virtue of the provisions of Subdivision (j) of Section 2800, Title 26, United States Codes, there became due and payable on the 1st day of November, 1942, a floor stocks tax of \$2.00 on each proof gallon and a proportionate tax at a like rate on all fractional parts of each proof gallon upon all distilled spirits upon which the Internal Revenue tax, imposed by law, had been paid, and which on the 1st day of November, 1942, was held and intended for sale; that the liquor hereinbefore referred to and so seized as aforesaid is specifically described in Paragraph III of the First affirmative defense set out in the Claim and Intervention of Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, and Edward Haft, filed herein on June 2, 1943. [59]

### III.

That all of the liquor so seized and specifically described was on November 1, 1942, held by the claimants Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, as co-partners doing business under the name of the Atlas Bar,

and by them and each of them intended for sale at that time, and that at all of the times thereafter the said premises at 137 East Park Street, in the city of Butte as aforesaid, were used and occupied by the claimants, the said Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, as a saloon and a place where distilled spirits, upon which the Internal Revenue tax of the United States was imposed, were held, intended for sale and sold for beverage purposes, that such business was carried on under the name and style of the Atlas Bar at all of said times.

#### IV.

That on April 20, 1943, certain Internal Revenue Officers of the United States of America went into the said premises at 137 East Park Street, in the city of Butte, in the state and district of Montana, known as the Atlas Bar, and found therein and upon said premises certain distilled spirits in bottles on which the above named floor stocks tax was imposed and upon which the said floor tax had not been paid, and in addition found therein and in the said place of business certain other quantities of distilled spirits in bottles, and that such of said distilled spirits in bottles, on which said floor tax had been imposed and had not been paid and which were then in said Atlas Bar at said address on the said 20th day of April, 1943, were there kept, maintained and had by the claimants Edward Haft and Joseph P. Boyle, also known as J. P. Boyle and Joe Boyle, for the purpose of being sold and re-

moved by the said last named persons who were then and there the owners thereof and the persons operating the said business in fraud of the Internal Revenue law of the United States of America and with [60] design to avoid payment of the floor stocks tax levied and assessed upon such distilled spirits, and that by reason thereof and of the provisions of Section 3720, Title 26 of the United States Codes such distilled liquors and all other distilled liquors in the place of business specifically described in Paragraph III of the First Affirmative Defense of the claimants Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, and Edward Haft, filed herein on June 2, 1943, became subject to seizure and forfeiture to the United States of America, and the same and the whole thereof were immediately seized by said officers of the Internal Revenue of the United States and taken into their possession and custody and that the same now are in their possession and custody at Butte, Montana.

## V.

The Court finds generally each and all of the issues presented by the pleadings on file herein in favor of the libelant and against the libelee and claimants Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, and Edward Haft.

From the foregoing facts the Court draws the following:

## CONCLUSIONS OF LAW

## I.

That this Court has jurisdiction of this proceeding and of the subject matter thereof and of the libelant, the libee and said Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle.

## II.

That the 406 bottles of distilled liquor, the libee herein, and particularly described in Paragraph III of the first affirmative defense in the claim and intervention of the said Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, was on the 20th day of April, 1943, subject to seizure under the provisions of Section 3720, Title 26, United States Codes, and was rightfully and lawfully seized by the officers and agents of the Internal Revenue Department of the United States so seizing the same, and the same and each and all of the same are forfeited to the United States of America, the libelant herein.

## III.

That the libelant herein is entitled to all of the relief prayed for in its libel of information for condemnation filed herein on May 25, 1943, and is entitled to a decree of this court declaring all of said distilled spirits and liquors forfeited to the United States and to be disposed of by the Secretary of the Treasury of the United States and by law as provided, and is further entitled to a judg-

ment for its costs against the said Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle.

Let decree be entered accordingly.

JAMES H. BALDWIN  
Judge.

[Endorsed]: Filed Dec. 23, 1943, C. R. Garlow,  
Clerk. [62]

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That on December 23, 1943, the Decree was filed and entered herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [63]

**DECREE**

Herein a Warrant of Arrest and Monition, directing that the United States Marshal for the District of Montana seize 406 bottles of distilled liquor, described therein and in the libel of information for condemnation herein, and give notice thereof by publication in one issue of the Montana Labor News, a newspaper of general circulation, printed and published at Butte, Montana, and most likely to give notice to claimants, and by posting a copy of said Notice of Seizure in the most public manner at or near the place of trial, having been issued out of the above entitled court, in the above entitled cause on the 25th day of May, 1943, and delivered to the United States Marshal for the District of Montana, for execution, and it appearing

from the return of said United States Marshal, endorsed on said Warrant of Arrest and Monition, so issued, as aforesaid and the proof of publication attached thereto, that, acting thereunder, he attached 406 bottles of distilled liquor, consisting of whiskey, brandy, rum and gin, on May 25, 1943, and caused notice of such seizure to be given by publication in one issue of the Montana Labor News, a newspaper of general circulation, published at Butte, Montana, and posting a copy of said Notice of Seizure in the most public manner at the Federal Building in the city of Butte, that being the place of trial, more than fourteen days prior to the return day specified in said Notice of Seizure. [64]

And it appearing that prior to the return date herein one Edward Haft and one Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, co-partners doing business under the name of Atlas Bar, claiming to be the owners of the said 406 bottles of distilled liquor, filed their answer herein to the said libel of information and the matter came on regularly to be heard before the Court on the 21st day of December, 1943, upon the issues as made by the said libel of information, the answer and claim of the said Edward Haft and Joseph P. Boyle and the reply thereto of the libelant; libelant was represented by R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, and the said claimants Edward Haft and Joseph P. Boyle, as co-partners, were represented by their counsel and proctor, Earle N. Genzberger,

said Joseph P. Boyle, being also present in court, and thereupon oral and documentary evidence was submitted by and on behalf of the libelant and the said claimants, and the evidence having been closed, the cause was submitted to the Court for consideration and decision, and thereupon the Court being fully advised in the premises, did on the 23rd day of December, 1943, make and ordered filed and entered its Findings of Fact and Conclusions of Law, which said Findings of Fact and Conclusions of Law, so filed and entered in the office of the Clerk of the Court as aforesaid, are hereby referred to and by such reference hereof made a part as though set out herein in full.

Wherefore, by reason of the law and the evidence and the Findings of Fact and Conclusions of Law of the Court and the premises, It Is Ordered, Adjudged and Decreed and this does order adjudge and decree that the said 406 bottles of distilled liquor heretofore seized be and the same hereby is condemned and forfeited to the United States of America, libelant; that the United States Marshal for the District of Montana turn over and deliver to the Secretary of the Treasury of the United States, [65] or his duly authorized agent, to be disposed of by the said Secretary of the Treasury as provided by law.

It Is Further Ordered and Adjudged that the libelant herein do have and recover of and from said Edward Haft and Joseph P. Boyle, co-partners as aforesaid, its costs herein incurred and hereby taxed in the sum of \$32.08.

Done and dated December 23, 1943.

JAMES H. BALDWIN  
Judge.

[Endorsed]: Filed Dec. 23, 1943, C. R. Garlow,  
Clerk. [66]

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That on December 23, 1943, the Notice of Entry of Judgment was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [67]

**NOTICE OF ENTRY OF JUDGMENT**

To: Edward Haft and Joseph P. Boyle, and to Earle N. Genzberger, their attorney:

You and Each of You Are Hereby notified that a decree in the above entitled cause in favor of the libelant and against the libellees above named was duly and regularly given and made by the Court and ordered entered and filed in the office of the Clerk of the above entitled court on the 23rd day of December, 1943, a copy of which decree is herewith served upon you.

R. LEWIS BROWN

Assistant Attorney of the  
United States, in and for  
the District of Montana.

Attorney for Libelant.

Service of the foregoing and receipt of a true and correct *copy and receipt of a true and correct* copy of the decree, findings of fact and conclusions of law and cost bill acknowledged this 23rd day of December, 1943.

EARLE N. GENZBERGER

Attorney for Claimants Edward Haft and Joseph P. Boyle.

[Endorsed]: Filed Dec. 23, 1943, C. R. Garlow,  
Clerk. [68]

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That on December 31, 1943, the Motion for Rehearing, New Trial, or Review of Intervenors and Claimants was filed herein in the words and figures following, to-wit:

**[Title of District Court and Cause.] [69]**

**MOTION FOR REHEARING, NEW TRIAL,  
OR REVIEW**

To The Honorable James H. Baldwin, Judge of  
The District Court of The United States For  
The District of Montana:

Come now, Joseph P. Boyle and Ed Haft (co-partners doing business under the name of "Atlas Bar"), intervenors and claimants herein and move the above-entitled Court and the Honorable Judge thereof, to grant to these intervenors and claimants a review, rehearing, or new trial of the above-entitled cause or to grant such other relief to these

intervenors and claimants as to the Court may seem proper in the premises, from that certain judgment and Decree heretofore given and made in the above-entitled proceedings on December 23, 1943, and to set aside and vacate the Findings of Fact and Conclusions of Law heretofore made herein, on the following grounds and for the following reasons, to-wit:

1. Irregularity in the proceedings of the Court and of the adverse party by which these intervenors and claimants were prevented from having a fair trial.

(a) In that the United States Attorney, as Attorney for the Libelant, did not join with the Attorney for claimants and intervenors in moving for a vacation of the setting of said cause for trial, or a continuance of the date thereof by reason of the fact that libelant and these claimants and intervenors had pre- [70] viously agreed upon a settlement and compromise of said action.

(b) Irregularity in the proceedings of the Court in refusing to recognize the compromise and settlement made by the intervenors and claimants with the officers of the libelant, and in insisting that said cause be tried regardless of said compromise and settlement.

(c) Enforcing these intervenors and claimants to proceed with the trial of the action without the presence of the claimants and intervenors and without the presence of their witnesses.

(d) In dismissing witness C. D. McGarry from

the witness stand before he had concluded his testimony.

(e) In refusing to intervenors and claimants a recess of the trial for an hour and a half to 4:30 o'clock P. M. on Tuesday, December 21st, 1943, or to 10:00 A. M. on December 22, 1943, in order to enable Ed Haft, principal witness of the intervenors and claimants to be present and to testify.

2. Accident or surprise which ordinary prudence could not have guarded against in that these intervenors and claimants had, prior to the setting of the case for trial settled and compromised said action with the libelant and had paid all moneys demanded of them by the libelant to settle and compromise said cause.

3. Surprise on the part of these claimants and intervenors in that the libelant and the Court insisted on compelling these intervenors and claimants to proceed to the trial of this action after the settlement and compromise had been made and after all things required by said settlement and compromise of these intervenors and claimants to be done, had by them been done.

4. Excusable neglect on the part of these intervenors and claimants and their attorney in failing to prepare for trial after said case had been settled and compromised with the libelant and in the assumption by the attorney for these claimants and intervenors that said cause would not be brought on for trial upon the merits but assuming that a motion for the dismissal of the action would be made by the libelant. [71]

5. Abuse of discretion on the part of the Court in compelling these claimants and intervenors to proceed to trial under the circumstances set forth in the *proceeding* paragraphs of this motion, without the presence of these claimants and intervenors in the courtroom and particularly without the presence and attendance of claimant and intervenor, Ed Haft, the principal witness for claimants and intervenors.

6. Abuse of discretion on the part of the Court in dismissing witness C. D. McGarry from witness stand before counsel for intervenors and claimants had concluded examination and before cross-examination by the libelant.

7. Abuse of discretion on the part of the Court in refusing to recess the trial for an hour and a half to secure the testimony of witness Ed Haft who was absent from the city when the trial commenced, and who returned to Butte from Missoula, Montana, immediately upon learning that the case was on trial.

8. Errors of law occurring at said trial, excepted to by claimants and intervenors:

(a) Refusal of Court to continue the cause on motion of counsel for claimants and intervenors.

(b) Dismissal by Court of the motion of intervenors and claimants made at the close of the Government's case to dismiss the proceedings.

(c) Decree forfeiture of the 406 bottles of distilled spirits named as libelee in this action.

This motion is made and will be based upon the pleadings in the case, the papers on file, upon the

minutes of the Court, and the affidavits of Ed Haft, Earle N. Genzberger, Joseph P. Boyle, and C. D. McGarry filed herewith.

Dated December 31, 1943.

EARL N. GENZBERGER

Proctor and Attorney for Claimants and Intervenors, Joseph P. Boyle and Ed Haft as co-partners doing business under the name of the "Atlas Bar." [72]

Service of the foregoing motion for new trial acknowledged and copy thereof received this 31st day of December, 1943.

JOHN B. TANSIL

United States Attorney.

R. LEWIS BROWN

Assistant United States Attorney.

Attorney for Libelant.

[Endorsed]: Filed December 31, 1943. [73]

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That on December 31, 1943, the Affidavit of Earle N. Genzberger was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [74]

AFFIDAVIT OF EARLE N. GENZBERGER

State of Montana,

County of Silver Bow—ss.

Earle N. Genzberger, being first duly sworn, deposes and says:

I am the attorney for Joseph P. Boyle and Ed Haft, doing business as the "Atlas Bar" and the intervenors and claimants named in the above-entitled action.

Said claimants and owners consulted me immediately after the seizure of the libelee, to-wit: 406 bottles of distilled liquor at 137 East Park Street, Butte, Montana, on or about April 20th, 1943.

That said claimants and intervenors contended strenuously from the beginning that all Government taxes upon all of the liquor seized had been paid in full long prior to the seizure and on April 24th, 1943, I filed in the above-entitled Court in Cause No. 109, a petition for return of seized property which said petition was thereafter by the Court dismissed for want of jurisdiction.

That thereafter the present libel was filed and on behalf of said intervenors and claimants this affiant filed a "Claim and Intervention of owners and answer to Libel", and thereafter twice unsuccessfully attempted to have the proceeding set for trial.

Prior to October 20th, 1943, this petitioner was notified [75] that this case had been placed in the charge of Assistant United States Attorney Roy F. Allan, of the Billings office of the United States Attorney, and in October, 1943 officials of the Treasury Department, Internal Revenue Service, Alcohol Tax Unit, informed affiant that Mr. Roy F. Allan, Assistant United States Attorney, had authority from the Attorney General of the United

States to settle all pending actions, such as the case at bar.

And on or about October 19th, 1943, said Assistant United States Attorney referred affiant to Mr. D. E. Deneen, investigator in charge of the Alcohol Tax Unit, in order that a computation might be made by Mr. Deneen of the amount of money required by the Treasury Department, to settle and compromise the matters involved herein.

That at the said conference had with Mr. Deneen on or about October 20th, 1943, the amount of Four hundred forty-six and 26/100 (\$446.26) Dollars was demanded of the claimants in addition to additional taxes of which they were to be advised later. That Assistant U. S. Attorney Allan was informed of such compromise and orally confirmed the same.

That Mr. Deneen thereupon agreed to prepare and transmit the appropriate papers to affiant for delivery to and completion by the clients of this affiant, and on October 22, 1943, affiant received in the course of United States mail the following letter from Mr. Deneen:

Treasury Department  
Internal Revenue Service  
Alcohol Tax Unit

Office of  
Investigator in Charge  
In Reply Refer to: E:IC:DED.

Montana-575. (Floor Stocks Tax)

Helena, Montana,  
October 21, 1943.

Mr. Earle N. Genzberger  
Attorney at Law  
Lewisohn Building  
Butte, Montana.

Dear Mr. Genzberger: [76]

In accordance with our conversation at Butte, Montana, October 20, there is transmitted herewith Offer in Compromise in triplicate to be accomplished by your clients in the "Atlas Bar" case, Butte, Montana.

It is not necessary that the offer be signed by Boyle, Haft and Moutrey. If signed by Boyle and Haft it will be sufficient.

Certified check or bank draft in amount of \$446.26 made payable to the Treasurer of the United States to be attached to the offer which should be delivered to Assistant United States Attorney R. Lewis Brown, Butte. As a matter of record for this office, please advise when you deliver the offer with remittance to Mr. Brown.

As explained to you yesterday the amount of the

offer \$446.26 represents 50 percent of the value of 60.97 proof gallons of distilled spirits or \$892.52.

Additional floor stocks tax due on the undeclared liquor will be set up for assessment and you will be advised as to the amount due.

Yours very truly,

D. E. DENEEN

Investigator in Charge.

mn/encl.

That upon receipt of said letter, affiant delivered to Assistant U. S. Attorney, R. Lewis Brown, at Butte, Bank Draft for \$446.26 on behalf of said claimants and intervenors.

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That thereafter and within the course of the following week, affiant received from Roy F. Allan, Assistant U. S. Attorney, what purported to be a copy of letter he had written to the Attorney General of the United States relative to this case, which read as follows:

Billings, Montana

October 26, 1943

The Attorney General  
Department of Justice  
Washington, 25, D.C.

Re: Alcohol Tax Unit  
Case No. Montana-575  
Joseph P. Boyle, et al.  
Atlas Bar, Butte, Montana  
(Floor Stocks Tax)

Dear Sir: [77]

The Helena office of the Alcohol Tax Unit reported the above-captioned case to this office on May 14, 1943.

An analysis of the facts of the case show that it was questionable whether or not a successful prosecution could be had in the District Court of the United States, in that the proof was based on speculation and conjecture.

Pursuant to Attorney General's Circular No. 3780, we have entered into negotiations with the defendants for a civil compromise of the case, both as to the tax liability and libel action.

Enclosed herewith you will find a cashier's check on the Miners National Bank of Butte, Montana, numbered 21,952, dated October 22, 1943, payable to the Treasurer of the United States, in the amount of \$446.26, which has been submitted by the defendants as an offer in compromise together with their duplicate statement.

We recommend that this offer and compromise be accepted.

The seized liquor, on which the floor stocks tax was not paid, has not as yet been released because the tax thereon has not been paid to the Collector of Internal Revenue. The defendants have promised that they will pay the tax to the collector within the next few days. As soon as they do their liquor will be released to them.

Respectfully,

JOHN B. TANSIL

United States Attorney

ROY F. ALLAN

Assistant U. S. Attorney

RFA :nm

Enclosures 3

cc: R. Lewis Brown, Butte, Montana  
D. E. Deneen, Helena, Montana  
Earle Genzberger, Butte, Montana

That prior to November 16th, affiant received a form of amended tax return from Mr. D. E. Deneen, investigator in charge of the Alcohol Tax Unit of the Treasury Department from Helena, Montana, calling for an additional tax from the claimants and intervenors herein in the amount of Three hundred ninety-five and 76/100 (\$395.76) Dollars which was necessary in order to complete the compromise and settlement of the above-entitled action.

That affiant secured the execution of the forms by Joseph P. Boyle, one of the intervenors and claimants and also secured from him a bank draft and personally delivered said draft in the amount

of Three hundred ninety-five and 76/100 (395.76) Dollars to [78] Mr. D. E. Deneen for transmission to the proper officers of the libelant on November 16th, 1943.

That on December 14th, 1943, affiant received from the Clerk of the United States Court, a copy of the order setting this case for trial and immediately and on December 14th, 1943, wrote to Mr. Roy F. Allan, Assistant United States Attorney at Billings, Montana, stating that the case had been set for hearing and requesting a continuance of the setting in view of the settlement and compromise.

That under date of December 16th, 1943, said Roy F. Allan, Assistant United States Attorney, wrote to affiant that he had re-submitted the offer and compromise of both civil and criminal liability to the Attorney General with the recommendation that the offer and compromise be accepted and that he would advise me further.

In view of the foregoing facts, I expected the United States Attorney to join with me in a request to the Court to continue the case for trial or to vacate the setting and did not anticipate a trial of said action on December 21, 1943. I, therefore, did not notify either Mr. Boyle nor Mr. Haft of the setting of the case for trial, did not subpoena any witnesses, and was not prepared to try said case upon said date.

That I had been ill the preceding week and had not recovered at the time of the setting of the case for trial and in anticipation of a definite word from

the United States Attorney's office I did not take the opportunity to call upon the Court prior to the morning of December 21, 1943.

I neglected to place this matter upon my office calendar as an engagement for Tuesday morning, December 21, 1943, and when I reached the United States courtroom after receiving a telephone call from the United States Attorney, at about 10:12 on Tuesday morning, December 21, I had found that the matter had been recessed until 10:30 A. M. and still felt that the United States Attorney [79] would join in a request for the vacation of the setting of the case for trial, or for a continuance thereof.

When the Court insisted upon proceeding to trial with the action, I was compelled to proceed to trial without clients or witnesses and during a recess, I succeeded in having third parties notify Mr. Boyle, and I learned that Mr. Haft was in the city of Missoula, where I reached him over the long distance phone about 12:30 P. M. Haft promised to hurry back to Butte and I so informed the Court but the Court refused to grant any recess and as a consequence I was unable to properly present the case of the claimants and owners herein and said claimants and owners were prevented from having a fair trial of the issues in this action, and had no opportunity to present properly their contentions to the Court herein.

That during the course of the trial I called witness T. D. McGarry, who prepared the original floor tax returns upon which this action was based.

That I intended to show by Mr. McGarry, that the inventory "Exhibit No. 5", from which he was testifying contained three entries of gin: one—"80 proof, 3 quarts, 24 pints, and 16 half pints," and that on the final return he changed the return of 80 proof gin to 90 proof gin and called the same "Old Boston", whereas there was no name on original inventory. Another gin entry was "gin 85 proof 12 half pints." The third was "Gin, 'Old Boston', 90 proof, 48 half pints."

I also proposed to show by the witness, McGarry that he had the original instructions from the Treasury Department given to taxpayers making floor tax returns as to liquor stocks held November 1st, 1942, and that such instructions did not call for the name of the brands of distilled liquors or of gins to be entered on the returns form 358.

McGarry would have also testified that said "Exhibit 5" has been in his possession ever since the receipt of same in the month [80] of November, 1942, and that he had made no changes thereon.

That the testimony of Ed Haft would have shown that he had prepared the inventory which was offered in evidence as "Exhibit 5" and that the same was in his handwriting and that it contained a list of all intoxicating liquor on the premises at 137 East Park Street after midnight of October 31st, 1942 and early morning of November 1st, 1942 when it was taken.

Haft also said he would have testified that if any errors occurred, said errors were unintentional or clerical and were not made with any intent whatever

to defraud the United States of any tax and that the error in misnaming the brand of the gin which was included on the inventory and which was included in Government's "Exhibits 1 and 2" and upon which the tax was paid, resulted in an overcharge to and over payment by claimants and intervenors of twelve and one-half per cent (12½%) more on the gin in question than these claimants and intervenors should have paid.

That this affiant for the reason hereinbefore given had not notified either Ed Haft or Joseph P. Boyle that the Court had set the case for trial on December 21st, 1943, and so far as affiant knows neither of the said claimants and intervenors had knowledge thereof prior to affiant's informing them of the trial on the date of the trial itself.

EARLE N. GENZBERGER

Subscribed and sworn to before me this 31st day of December, 1943.

JOHN J. WALSH

Notary Public for the State of Montana. Residing at Butte, Montana. My commission expires Feb. 26, 1946.

Service acknowledged, copy received Dec. 31, 1943.

JOHN B. TANSIL

U. S. Attorney

[Endorsed]: Filed Dec. 31, 1943.] [81]

That on December 31, 1943, the Affidavit of T. D. McGarry was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [82]

AFFIDAVIT OF C. T. McGARRY

State of Montana,  
County of Silver Bow—ss.

C. T. McGarry, being first duly sworn, deposes and says:

My name is C. T. McGarry. During the month of November, 1942, I was employed as a part-time accountant by J. J. Walsh, certified public accountant, 43 East Broadway Street, Butte, Montana.

I was called to testify in the above-entitled case. During the course of my examination I was asked with reference to an inventory, which I produced from my file, whether I knew in whose handwriting said inventory was. I replied that I did not.

After an argument, the Judge asked me to leave the witness stand which I did. I was not asked what I did with reference to the inventory. I was not permitted to explain that there was on the inventory the entries:

“Gin 80 proof, 3 quarts, 24 pints, and 16 half pints”, and that on the final return I changed the return of 80 proof gin to 90 proof gin and called the same “Old Boston”, whereas there was no name on original inventory. Another gin entry was “gin 85 proof 12 half pints.” The third was “Gin, “Old Boston”, 90 proof, 48 half pints.” [83]

I also had in my possession the original mimeograph or printed instructions sent out by the Treasury Department in connection with the floor tax returns. These instructions did not call for listing brands of liquor. It was my practice and custom to list the brands for our own convenience in checking the quantities and proofs of the respective liquors.

Had I been permitted to do so I would have also testified that when I came to the entry "gin, 3 quarts, 24 pints, 16 half pints" I could not find on the list in my office an "80 proof Gin" but found later on the inventory "Old Boston" Gin listed as 90 proof and I assumed that the person who made the inventory had made a mistake and I wrote the return:

"Old Boston Gin, quarts 3, pints 24, one half pints 16," and changed the proof from 80 to 90.

My return also was in error in calling "Pembrook Whiskey" "Pembrook Gin", 27½ pints, because there is no "Pembrook Gin", although this mistake made no difference in the tax.

This was an error on my part but resulted in having the taxpayer pay tax upon said forty-three bottles of gin on the basis of 90 proof instead of 80 proof, an increase of 12½%—so that Haft and Boyle actually paid 12½% more tax upon the gin in question than they should have properly paid.

I also found later upon the inventory the entry "192 Bottles of Barclay." this was missed by me on making up the original inventory because it was

separated from the other inventory by being on another page, and was separated from the balance of the inventory by two or more blank pages.

T. D. McGARRY

Subscribed and sworn to before me this 31st day of December, 1943.

[Notarial Seal] JOHN J. WALSH

Notary Public for the State of Montana, residing at Butte, Montana. My Commission expires Feb. 26, 1946.

Service acknowledged, copy received Dec. 31, 1943.

R. LEWIS BROWN,  
Asst. U. S. Attorney

[Endorsed]: Filed Dec. 31, 1943. C. R. Garlow,  
Clerk. [84]

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That on December 31, 1943 the Affidavit of Joseph P. Boyle was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [85]

AFFIDAVIT OF JOSEPH P. BOYLE

State of Montana,  
County of Silver Bow—ss.

Joseph P. Boyle, being first duly sworn, deposes and says:

My name is Joseph P. Boyle. I am one of the owners and claimants of the 406 Bottles of distilled

spirits named as libelee in the above-entitled action.

That I was not personally informed that the case had been set for trial until about 11:00 o'clock on the morning of Tuesday, December 21, 1943, when I was informed over the telephone that the trial was then in progress. I was surprised that the trial was in progress because two months previous I had been informed that if I would pay to the Government the sum of \$446.26 and such additional sum as the computation of the Alcohol Tax Unit officials showed to be due for an additional tax, that all pending matters would be fully settled and compromised, and rather than submit to the time and embarrassment and expense of one or more law suits, I consented to the settlement and compromise, and on October 22, 1943, paid to the Government \$446.26, and thereafter I signed an amended return prepared by the Internal Revenue Department, and with that paid the additional sum of \$395.76. Both of said sums have been retained by the libelant.

That immediately upon learning that the case was set [86] for trial, I tried to find the principal witness, my co-claimant and intervenor, Ed Haft, and learned that he was in the city of Missoula in the course of his employment by the Kitto Transfer Company.

I had no intention of evading any floor tax due from the "Atlas Bar" for distilled spirits on hand for sale on November 1st, 1942, and any errors, if any there were, were honest mistakes, were unintentional, and were not made with the intent to defraud the United States.

JOSEPH P. BOYLE

Subscribed and sworn to before me this 31st day of December, 1943.

[Notarial Seal] JOHN J. WALSH

Notary Public for the State of Montana, residing at Butte, Montana. My Commission expires Feb. 26, 1946.

Service acknowledged, copy received Dec. 31, 1943.

JOHN B. TANSIL

U. S. Attorney

R. LEWIS BROWN

Asst. U. S. Attorney

[Endorsed]: Filed Dec. 31, 1943. [87]

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That on December 31, 1943 the Affidavit of Ed Haft was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [88]

#### AFFIDAVIT OF ED HAFT

State of Montana,

County of Silver Bow—ss.

Ed Haft, being first duly sworn deposes and says: I am one of the intervenors and claimants to the 406 Bottles of Distilled Spirits named as Libelee in the above entitled action. That I did not learn that the said action was set for trial until 12:28 P. M. on Tuesday, December 21, 1943, the date of the trial when my attorney, Earle N. Genzberger of

Butte, reached me over the long distance telephone at Missoula, Montana, approximately one hundred twenty-four (124) miles away from the place of trial to which place I had driven by truck in the course of my employment by the Kitto Transfer Company by whom I'm employed as a truck driver. Mr. Genzberger told me over the phone that the trial of the above-entitled libel was in progress, and I immediately completed the loading of my employer's truck with furniture and household goods and hastened to Butte. I arrived at the Federal Building in Butte about 4:05 P. M. on Tuesday afternoon December 21, 1943, and found the courtroom door locked and went to the Clerk's office and there learned that the case was over. [89]

If I had been permitted to testify as a witness on behalf of myself and partner, intervenors in the above entitled action, I would have testified that I took the inventory of all distilled spirits in the Atlas Bar about midnight of October 31, 1942, and immediately thereafter, and that the inventory (which I understand was offered at the trial as "Exhibit No. 5" for identification), was in my own handwriting and was written by me upon the occasion of taking such inventory.

I would have testified that I listed every bottle of liquor at the Atlas Bar at 137 East Park Street, Butte, Montana, and that I listed all of the gin in said place, and that the tax was paid on all gin that was in our place of business at 137 East Park Street or which we owned and held for purpose of sale.

That I listed on the said inventory "three quarts, twenty-four pints, and sixteen one-half pints of gin, 80 proof."

I also listed "Gin—85 proof, 12 half pints", and Gin "Old Boston, 90 proof, 48 half pints." That was all the Gin on hand at that date.

That I delivered the inventory that I had made to John J. Walsh, a certified public accountant at Butte, Montana, having his office at 43 East Broadway, Butte, Montana, and he later gave me the type-written return which I signed and swore to before him. In signing the return, I did not notice that the accountant had changed the gin which I listed at 80 proof to 90 proof and had given it the name "Old Boston" instead of "Cavalier". On my inventory I did not state any brand of gin.

Had I been allowed to testify, I would have produced also the printed instructions that we received from the Internal Revenue Bureau relative to the floor tax returns on liquor stocks held by us for sale on November 1st, 1942. These printed instructions do not provide for the listing of brands. I put the whiskey brands on my inventory but did so for my own convenience in re-checking the stock, but I did not do this in the case of gin, brandy, rum, wine, beer, with one exception. [90]

I also inventoried sixteen cases of Barclay's whiskey, 80.6 proof which was overlooked by the accountant in making the return, because I had placed the same upon a separate sheet in my inventory.

We never intended to evade any floor tax upon

any of this liquor, and I never had the discrepancy called to my attention until after these proceedings were instituted.

I have been surprised that this case was set for trial because on or about October 20th, 1943, through my attorney, the United States Attorney's Office and the officials of the Alcohol Tax Unit offered us a complete compromise and settlement of all pending matters upon the payment of Four hundred forty-six and 26/100 (\$446.26) Dollars in addition to the payment of a tax which the Alcohol Tax Unit had computed as being due from us. My partner and I paid this money on or about October 22, 1943, and thereafter my partner signed the amended tax return prepared for us by the officials of the Alcohol Tax Unit and at that time we paid an additional tax to the United States amounting to Three Hundred ninety-five and 76/100 (\$395.76) Dollars.

We, therefore, assumed that the above-entitled and numbered case had been fully settled and compromised with the Government of the United States, the libelant herein, and were not prepared on Tuesday, December 21, 1943, for the trial of said action.

This affidavit is made for the purpose of obtaining a new trial, a re-hearing, or review of the judgment heretofore given and made in the above entitled action on December 23, 1943, and to relieve this affiant and his partner and co-intervenor, Joseph P. Boyle, herein from the said judgment taken against us and both of us through our inadvertence, surprise, and excusable neglect, caused through

our reliance upon the settlement and compromise made by us with the libelant herein.

ED HAFT [91]

Subscribed and sworn to before me this 31st day of December, 1943.

[Notarial Seal] JOHN J. WALSH

Notary Public for the State of Montana, residing at Butte, Montana. My commission expires Feb. 26, 1946.

Service acknowledged, copy received Dec. 31, 1943.

JOHN B. TANSIL

U. S. Attorney

R. LEWIS BROWN

Asst. U. S. Attorney

[Endorsed]: Filed Dec. 31, 1943. [92]

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That on January 4, 1944 the Libelant's Objections to the Motion for Rehearing, New Trial or Review were filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [93]

#### OBJECTIONS TO THE MOTION FOR REHEARING, NEW TRIAL OR REVIEW

Comes now the libelant, United States of America, and objects to the granting by the Court of the motion for rehearing, new trial or review filed herein by Joseph P. Boyle and Edward Haft (co-partners doing business under the name of Atlas

Bar), intervenors and claimants herein, upon the grounds and for the reasons following, to-wit:

1. That no legal reason appears for the granting of said motion, or for a rehearing, new trial or review of the decision of the Court herein.
2. That the motion for such rehearing, new trial or review is on its face insufficient to put the power of the Court in motion, or to support an order granting a rehearing, new trial or review of the said cause.
3. That it appears from the face of the affidavits, filed as a part of the said motion and by the intervenors and their counsel, that any evidence that the said intervenors desire to bring to the attention of the court, if their said motion is granted, was within their knowledge and possession prior to the time of the trial of this cause and at the time the same was set for trial and was not produced at the trial of said cause solely because of the neglect of the said intervenors to appear at the trial and to testify therein and that the essence of the evidence the intervenors desire to bring to the attention of the Court is [94] such that it goes to establish as false and untrue the statements of fact made under oath by Edward Haft, one of the intervenors, in making his return to the Collector of Internal Revenue for the District of Montana, and to establish that the said Edward Haft was guilty of false swearing at said time, and further that if all of said testimony and evidence had been offered at the trial of said cause that is now desired to be offered, the same

would not have been sufficient to have required any decision or judgment different from that entered herein by the Court.

These objections are made and will be based upon the files and records of the above entitled court, upon the minutes of the court, the evidence introduced at the hearing and upon the affidavit of R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, filed herein.

R. LEWIS BROWN

Assistant Attorney of the  
United States, in and for  
the District of Montana.

Admission of Service, Jan. 4, 1944.

EARLE GENZBERGER

Attorney for Intervenors.

[Endorsed]: Filed Jan. 4, 1944. H. H. Walker,  
Clerk. [95]

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That on January 4, 1944 the Affidavit of R. Lewis Brown was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [96]

AFFIDAVIT

United States of America,  
District of Montana—ss.

R. Lewis Brown, being first duly sworn on his oath, deposes and says:

That he is now and at all of the times hereinafter mentioned has been a duly appointed, qualified and acting Assistant Attorney of the United States, in and for the District of Montana; that as such Assistant Attorney of the United States he has had personal charge of the above entitled cause and personally prepared for filing and filed the libel of information filed herein; that after the filing of the libel of information herein, Earle N. Genzberger, the attorney for the intervenors, discussed with affiant the possibility of the entering into a compromise by the intervenors and the United States of the civil and criminal liability of the intervenors by reason of the seizure of certain liquors proceeded against in this cause, belonging to the intervenors, because of the claimed failure of the said intervenors to pay the floor stocks tax due on the said liquors on the 1st day of November, 1942; that affiant advised the said counsel that the Attorney General of the United States had authority to either make or refuse to make such compromise and further advised the said counsel that if the intervenors cared to make such proposition of settlement and cared to tender a cashier's check for one-half the value of the said liquor so seized, payable to the **1971** Treasurer of the United States, affiant would cause said proposition of settlement and cashier's check to be transmitted to the Attorney General of the United States for his action and consideration, and that thereupon the cashier's check, payable to the Treasurer of the United States, in the sum of

\$446.26, was delivered to me by said attorney and that I caused the same to be transmitted to the Attorney General of the United States by and through Mr. Roy F. Allan, Assistant Attorney of the United States, in and for the District of Montana; that said proposed settlement and compromise was not requested or solicited from the said intervenors by the United States Attorney's office of the District of Montana, or any members thereof, or of the Alcohol Tax Unit for the District of Montana, or offered to said intervenors by said officers, but was initiated and solicited by the intervenors themselves.

That thereafter and before the setting of this cause for trial, the Attorney General of the United States refused to accept the said compromise or the said offer in compromise and refused to compromise the civil and or criminal liability of the intervenors as requested and solicited by them, and returned said draft to Mr. Allan for delivery to the intervenors and that Mr. Allan, upon receipt of said draft, thereafter resubmitted the said offer in compromise to the Attorney General of the United States; that affiant was informed by Mr. Earle N. Genzberger that he had received a letter from Mr. Allan, Assistant United States Attorney as aforesaid, informing him that the Attorney General of the United States had refused said offer in compromise and rejected the same and informing him further that he, Mr. Allan, was resubmitting the same to the Attorney General of the United States; that the day after this cause was set for trial, and while affiant was at his lunch, Mr. Genzberger, the

counsel for the intervenors came to the table at which affiant was sitting and informed the affiant that the case had been set for trial. He [98] then asked affiant if he, affiant, would see the presiding Judge and have the case continued. Affiant advised the counsel that he had no intention of interviewing the Judge for the purpose of requesting a continuance of the trial of this cause and further advised the counsel that if he, the counsel, desired the cause to be continued, that if the counsel would come to the affiant's office, that affiant would go with the counsel, if the counsel so desired, to the Court and would inform the Court of the status of the compromise as hereinabove set forth, and would not oppose any motion for a continuance that he desired to make and affiant further informed the counsel that if counsel did not so do that, so far as affiant knew the case would be tried at the date set; that the counsel then informed affiant that he would come up to the affiant's office that same afternoon and would request a continuance of the cause; that although affiant was in his office that afternoon the counsel did not come to affiant's office that afternoon or at any time between the date of the said conversation and the trial of the said cause and that affiant thereby assumed it was the desire of the intervenors to try the said cause at the date set for trial, and prepared for trial of the same and had his witnesses in attendance; that at the date, time and place set for trial of the said cause, to-wit: at 10:00 o'clock on December 21st, 1943, affiant was

present in court with his witnesses ready to proceed to trial, that the Judge came into court at the hour of 10:00 o'clock and the Court was thereupon opened, that the Court called the said cause for trial and that the counsel for the intervenors was not present in court; that affiant thereupon informed the Court that it was his belief that the intervenors desired to contest the said libel and to try the cause and requested the Court to continue the trial of the cause for a short time until affiant could get in touch by telephone with counsel for the intervenors; that the Court thereupon continued the trial of the said cause until the [99] hour of 10:30 o'clock of the same day; that affiant thereupon called the counsel for the intervenors at his office and informed counsel of what had transpired that morning and counsel informed the affiant he had neglected to make a note of the time set for the trial and had forgotten it, but he would immediately come to the federal building; and further affiant sayeth not.

R. LEWIS BROWN

Subscribed and sworn to before me this 4th day of January, 1944.

[Seal]

HAROLD L. ALLEN

Deputy Clerk, United States  
District Court, for the Dis-  
trict of Montana.

[Endorsed]: Filed January 4, 1944. H. H. Walker, Clerk. [100]

That on April 14, 1944 an Entry was made in the Minutes of said District Court of the Order In Re: Session of Court to be Held at Butte, Montana, wherein all motions pending undetermined in the Butte Division of said Court were set for hearing at said place on April 22, 1944, in the words and figures following, to-wit:

**[Title of District Court.] [101]**

54th Day October Term, 1943 Friday April 14, 1944

11:30 A. M. Court convened pursuant to Order

Present: Honorable James H. Baldwin, Judge.

In Re: Session of Court to be Held at Butte, Montana.

**ORDER**

It Is Ordered, and this does order:

1. That a session of the above entitled court be held at the courtroom thereof in the city of Butte, in the state and district of Montana, commencing at the hour of ten o'clock in the morning on Saturday, April 22, 1944;
2. That all motions pending undetermined in the Butte Division of said court be and the same are hereby set for hearing at that time and place; and
3. That the Clerk of the above entitled Court shall forthwith notify the attorneys for the parties litigant in the matters referred to in the last preceding paragraph, by mail, of the setting of said motions for hearing, as aforesaid.

Court thereupon suspended until such time as the further business of the Court shall require it to again resume.

H. H. WALKER,

Clerk.

By ELAINE E. WILLIAMS

Deputy. [102]

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That on April 22, 1944, an Entry was made in the Minutes of said District Court concerning the denial of the Motion for Rehearing, New Trial or Review of Claimants and Intervenors in the words and figures following, to-wit:

[Title of District Court.] [103]

Butte Division Civil Cause No. 110.

United States v. 406 Bottles of Distilled Liquor.

This cause came on regularly for hearing this day on Motion For Rehearing, New Trial or Review of Claimants and Intervenors Joseph P. Boyle and Ed Haft and on objections to said motion. Messrs. R. Lewis Brown and Harlow Pease, Assistants to the Attorney of the United States in and for the District of Montana, were present in Court and represented the United States. Mr. Earle N. Genzberger was present in Court on behalf of said Claimants and Intervenors Joseph P. Boyle and Ed Haft.

Thereupon said motion was argued by Mr. Genz-

berger, whereupon at the conclusion of his argument, the Court ordered that the Motion For Rehearing, New Trial or Review of Claimants and Intervenors Joseph P. Boyle and Ed Haft will be denied. Thereupon Mr. Genzberger asked for an exception to the ruling of the Court, whereupon the Court ordered that an exception to this ruling be noted on the record.

Entered in open Court at Butte, Montana, April 22, 1944.

H. H. WALKER,  
Clerk [104]

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That on August 7, 1944 the Statement of Points To Be Relied Upon On Appeal of Intervenors and Claimants was filed herein in the words and figures following, to-wit:

[Title of the District Court and Cause.] [105]

STATEMENT OF POINTS TO BE RELIED  
UPON ON APPEAL

The following is a concise statement of the points upon which the Claimants and Intervenors in the above-entitled cause, Joseph P. Boyle and Ed Haft, intend to rely on its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment and Decree entered hereon on December 23, 1943 by the United States District Court of the District of Montana, Butte Division:

1. The Court erred in denying the Motion of

Claimants and Intervenors, herein, for a continuance of trial of said cause.

2. The Court erred in denying the request of said Claimants and Intervenors for production of offending liquor in Court for use on cross-examination of the witness, J. H. Cosgriff.

3. The Court erred in denying the formal motion of Claimants and Intervenors to compel the Government to produce offending liquor in Court.

4. Denial of the Motion of Claimants and Intervenors to dismiss said cause made at the close of the Government's case.

5. Abuse of discretion in denying Claimants and Intervenors' Motion for recess to permit the attendance of the witness Ed Haft who was a necessary witness on behalf of said Claimants and Intervenors to prove the case of said Claimants and Intervenors from 3:00 P. M. to 4:30 P. M. on Tuesday, December 21, 1943.

6. Abuse of discretion in denying Claimants and Intervenors a recess from 3:00 P. M. on December 21, to 10:00 A. M. [106] on December 22nd, 1943 in order to enable Ed Haft, principal witness of Claimants and Intervenors to be present and to testify.

7. The Court erred in refusing to permit the witness C. D. McGarry to complete his testimony and in ordering the attorney for Claimants and Intervenors to call his next witness.

8. The Court erred in denying and overruling the Motion of Claimants and Intervenors to dismiss

the proceedings, made at the close of all the evidence on all the grounds stated in said motion.

9. There was introduced in this case no evidence sufficient to support the facts as found by the Court or the conclusions of law based thereon.

10. The Court erred in entering a Judgment of Forfeiture and entering a Decree against Claimants and Intervenors, herein.

11. The Court erred in overruling and denying Claimants and Intervenors' Motion for Rehearing, New Trial or Review on all the grounds stated in said motion.

Dated this 7th day of August, 1944.

EARLE N. GENZBERGER

Attorney for Claimants and  
Intervenors

Service of the foregoing Statement of Points to be relied upon on Appeal, acknowledged, and copy thereof received this 7th day of August, 1944.

JOHN B. TANSIL

United States Attorney

R. LEWIS BROWN

Asst. United States Attorney

[Endorsed]: Filed August 7, 1944, H. H. Walker,  
Clerk. [107]

That on July 20, 1944 the Intervenors and Claimants filed their Notice of Appeal herein in the words and figures following, to-wit:

[Title of the District Court and Cause.] [108]

**NOTICE OF APPEAL**

To: The United States of America, Libelant above named, and to Honorable John B. Tansil, U. S. Attorney for the District of Montana, and to Honorable R. Louis Brown, Assistant U. S. Attorney for the District of Montana, Attorneys for Defendants.

You and each of you are hereby notified and will please take notice that Edward Haft and Joseph P. Boyle, Claimants and Intervenors in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, from the final Judgment and Decree given, made, rendered and entered in the above entitled cause by the above entitled court on the 23rd day of December, 1943.

Dated this 20th day of July, 1944.

**EARLE N. GENZBERGER**

Attorney for Claimants and  
Intervenors.

[Endorsed]: Filed July 20, 1944, H. H. Walker,  
Clerk. [109]

That on August 4, 1944 the Bond for Cost on Appeal was filed herein in the words and figures following, to-wit:

[Title of the District Court and Cause.] [110]

BOND FOR COST ON APPEAL

Know All Men By These Presents:

That Edward Haft and Joseph P. Boyle, both of Butte, Montana, as principals, and Rudy E. Endresse and Helena P. Walsh, both of Butte, Montana, as sureties, hereby acknowledge themselves jointly and severally firmly bound to the above named Libelant, the United States of America, in the sum of Two hundred and fifty and no/100 (\$250.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we, and each of us respectively, bind ourselves, our and each of our executors, administrators, and heirs, jointly and severally, as aforesaid, firmly by these presents.

Sealed with our seals and dated this 4th day of August, 1944.

The conditions of the above obligation is such that whereas, the Claimants and Intervenors herein are appealing to the United States Circuit Court of Appeals for the 9<sup>th</sup> Circuit from that Final Judgment and Decree of the above entitled District Court, filed and entered in the above entitled cause on the 23rd day of December, 1943 and from the Order of said District Court entered on the 22nd day of April, 1944 denying and overruling the Motion of Claimants and Intervenors. Joseph

P. Boyle and Edward Haft for Rehearing, New Trial or Review.

Now, Therefore, if the said Claimants and Intervenors [111] shall pay the costs of Appeal; if the Appeal be dismissed or said Judgment and Decree and Order, or either of them be affirmed; or such costs, as such Appellate Court may award if such Judgment and Decree and Order, or either of them, is modified, then this obligation shall be null and void, otherwise to be and remain in full force and effect.

In witness whereof, we have hereunto set our hands and seals this 4th day of August, 1944.

EDWARD HAFT

JOSEPH P. BOYLE

RUDY E. ENDRESSE

HELENA P. WALSH

State of Montana,

County of Silver Bow—ss.

Rudy E. Endresse and Helena P. Walsh, the sureties mentioned in the foregoing Bond, being first duly sworn, each for himself, says: I am a resident and freeholder and householder within the County of Silver Bow, State of Montana, and worth double the amount of the within bond over and above all my just debts and liabilities and not including property exempt from execution.

RUDY E. ENDRESSE

HELENA P. WALSH

Subscribed and sworn to before me this 4th day  
of August, 1944.

[Notarial Seal] JOHN J. WALSH  
Notary Public for the State of Montana, residing  
at Butte, Montana.

My commission expires Feb. 26, 1946.

[Endorsed]: Filed August 4, 1944, H. H. Walker,  
Clerk. [112]

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That on August 5, 1944 the Order for Bond on  
Appeal was filed herein in the words and figures  
following, to-wit:

[Title of the District Court and Cause.] [113]

#### ORDER FOR BOND ON APPEAL

It appearing to the Court herein that the above  
named Joseph P. Boyle and Ed Haft, as Claimants  
and Intervenors herein, have appealed to the  
Circuit Court of Appeals from the Judgment of  
Forfeiture heretofore duly given and made on  
December 23, 1943, and on Motion of Earle N.  
Genzberger, Attorney for Claimants and Intervenors  
herein, for a stay of proceedings, pending  
appeal and this appearing to be a proper cause  
therefor,

It Is Ordered, and this does order, that upon  
the filing by the Claimants and Intervenors of a  
bond in the penal sum of Five hundred and no/100  
(\$500.00) Dollars within five days from the date  
hereof, with sureties, to be approved by this Court,

conditioned for the satisfaction of the Judgment of this Court and of the Appellate Court, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the Judgment is affirmed, and to satisfy in full such modification of the Judgment or such costs, interest and damages as the Appellate Court may adjudge or award, that the operation of the Judgment of December 23, 1943, be suspended and that the property described in said Judgment herein shall remain in the custody of the United States Marshal for the District of Montana, subject to the further order of this Court or of the Appellate Court, during the pendency of the appeal to the Circuit Court of Appeals [114] for the Ninth Circuit and until the determination of said appeal by said Court and for thirty (30) days thereafter.

Dated this 5th day of August, 1944.

JAMES H. BALDWIN

Judge.

[Endorsed]: Filed August 5, 1944, H. H. Walker,  
Clerk. [115]

That on August 5, 1944 the Bond for Stay of Proceedings on Appeal was filed herein in the words and figures following, to-wit:

[Title of the District Court and Cause.] [116]

BOND FOR STAY OF PROCEEDINGS  
ON APPEAL

Know All Men By These Presents:

That Edward Haft and Joseph P. Boyle, both of Butte, Montana, as principals, and Rudy E. Endresse and Helena P. Walsh, both of Butte, Montana, as sureties, hereby acknowledged themselves jointly and severally firmly bound to the above named Libelant, the United States of America, in the sum of Five hundred and no/100 (\$500.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we, and each of us respectively, bind ourselves, our and each of our executors, administrators and heirs, jointly and severally, as aforesaid, firmly by these presents.

Sealed with our seals and dated this 4th day of August, 1944.

The conditions of the above obligation is such that whereas, the Claimants and Intervenors herein are appealing to the United States Circuit Court of Appeals for the 9th Circuit from that Final Judgment and Decree of the above entitled District Court, filed and entered in the above entitled cause on the 23rd day of December, 1943 and from the Order of said District Court entered on the 22nd

day of April, 1944 denying and overruling the Motion of Claimants and Intervenors, Joseph P. Boyle and Edward Haft for Rehearing, New Trial or Review and have requested a stay of Proceedings herein. [117]

The conditions of this obligation are such that if the said Joseph P. Boyle and Edward Haft, claimants and Intervenors herein shall prosecute the appeal to effect and shall satisfy the Judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the Judgment is affirmed, or shall satisfy in full such modification of the Judgment and such costs, interest and damages as the said Circuit Court of Appeals may adjudge or award, then this obligation shall be void; otherwise to remain in full force and effect.

In Witness Whereof, we have hereunto set our hands and seals this 4th day of August, 1944.

EDWARD HAFT

JOSEPH P. BOYLE

RUDY E. ENDRESSE

HÉLENA P. WALSH

State of Montana

County of Silver Bow—ss.

Rudy E. Endresse and Helena P. Walsh, the sureties mentioned in the foregoing Bond, being first duly sworn, each for himself, says: I am a resident and freeholder and householder within the County of Silver Bow, State of Montana and worth

double the amount of the within bond over and above all my just debts and liabilities and not including property exempt from execution.

RUDY E. ENDRESSE  
HELENA P. WALSH

Subscribed and sworn to before me this 4th day of August, 1944.

[Notarial Seal] JOHN J. WALSH  
Notary Public for the State of Montana, residing at Butte, Montana. My Commission expires Feb. 26, 1946.

Approved this 5th day of August, 1944.

JAMES H. BALDWIN  
Judge

[Endorsed]: Filed August 5, 1944. H. H. Walker, Clerk. [118]

That on August 7, 1944 the Intervenors and claimants filed herein their Designation of Contents of Record on Appeal in the words and figures following, to-wit:

[Title of the District Court and Cause.] [119]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

To: Honorable Harry H. Walker, Clerk of the Above Entitled Court.

Comes now the Claimants and Intervenors, Joseph P. Boyle and Edward Haft in the above en-

titled cause and hereby designates to be contained in the Record on Appeal, the following papers, to-wit:

1. Libel of Information for Condemnation.
2. Notice of Seizure.
3. Claim and Intervention of Owners and Answer to Libel of Edward Haft and Joseph P. Boyle.
4. Warrant of Arrest and Monition with Marshal's Return.
5. Reply.
6. Clerk's Minutes Entry, dated August 27, 1943.
7. Order Setting Case for Trial at Butte on Dec. 21, 1943.
8. Motion to Compel Production of Liquor in Court.
9. Clerk's Minutes Entry dated December 21, 1943.
10. Plaintiff's Exhibit No. 1
11. Plaintiff's Exhibit No. 2.
12. Defendant's Exhibit No. 3.
13. Narrative Statement of Evidence.
14. Motion to Dismiss.
15. Clerk's Minutes Entry dated December 23, 1943.
16. Findings of Fact and Conclusions of Law.
17. Decree of Condemnation and Foreiture, and for Costs.
18. Notice of Entry of Judgment.
19. Motion for Rehearing, New Trial or Review of Claimants and Intervenors, Joseph P. Boyle and Ed Haft.
20. Affidavit of Earle N. Genzberger.

21. Affidavit of C. D. McGarry.
22. Affidavit of Joseph P. Boyle.
23. Affidavit of Ed Haft.
24. Objections to New Motion for Rehearing,  
New Trial of Review.
25. Affidavit of R. Lewis Brown.
26. Clerk's Minutes Entry dated April 14, 1944  
and Order contained therein.
27. Order Denying Motion for Rehearing, New  
Trial or Review, dated April 22, 1944.
28. Statement of Points to be relied upon on Ap-  
peal. [120]
29. Notice of Appeal.
30. Bond for Cost on Appeal.
31. Order for Bond on Appeal.
32. Bond for Stay of Proceedings on Appeal.
33. This Designation of Record.
34. Clerk's Certificate.

Dated this 7th day of August, 1944.

EARLE N. GENZBERGER

Attorney for Claimants and  
Intervenors

Service of the foregoing Designation of Contents  
of Record acknowledged, and copy thereof received  
this 7th day of August, 1944.

JOHN B. TANSIL

United States Attorney

R. LEWIS BROWN

Asst. United States Attorney

[Endorsed]: Filed August 7, 1944. H. H.  
Walker, Clerk. [121]

In the District Court of the United States  
District of Montana  
Butte Division  
No. 110

UNITED STATES OF AMERICA,  
Libelant,  
vs.

406 Bottles of Distilled Liquor,  
Libelee,  
JOS. P. BOYLE and ED HAFT,  
Claimants and Intervenors.

ORDER

Upon application of the Claimants and Intervenors herein, Joseph P. Boyle and Edward Haft, and for good cause shown and being fully advised in the premises.

It is Ordered , and This Does Order, that the time for filing the Record on Appeal herein and docketing this action in the Circuit Court of Appeals for the Ninth Circuit is extended to and including the 20th day of September, 1944.

Dated this 26 day of August, 1944.

JAMES H. BALDWIN  
Judge

Attest, a True Copy:

[Seal] H. H. WALKER,  
Clerk.

By HAROLD L. ALLEN  
Deputy.

[Endorsed]: Filed & Entered August 26, 1944.

H. H. Walker, Clerk. [122]

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD ON APPEAL

United States of America,

District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States for the District of Montana, do hereby certify to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 122 pages, numbered consecutively from 1 to 122, inclusive, is a full, true and correct transcript of all matter designated by the parties and required by rule as the record on appeal in case No. 110, United States of America, Libelant, v. 406 Bottles of Distilled Liquor, Libellees, Joseph P. Boyle and Edward Haft, Claimants and Intervenors, excepting the so-called Narrative Statement of the Evidence designated by said Claimants and Intervenors which was by the order of said District Court made and entered on August 28, 1944, ordered stricken from the record of said

District Court as an encumbrance thereon and deemed by said order to be not proper for inclusion as a part of the record in this transcript of record on appeal, as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Twenty-three and 80/100 Dollars (\$23.80) and have been paid by the appellants.

Witness my hand and the seal of said District Court at Butte, Montana, this 16th day of September, 1944.

[Seal]

H. H. WALKER,

Clerk.

HAROLD L. ALLEN

By Harold L. Allen

Deputy Clerk. [123]

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[Endorsed]: No. 10874. United States Circuit Court of Appeals for the Ninth Circuit. Joseph P. Boyle and Edward Haft, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed September 18, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of  
Appeals for the Ninth Circuit

No. 10874

**JOSEPH P. BOYLE and EDWARD HAFT,**  
Appellants,  
vs.UNITED STATES OF AMERICA, Libelant,  
Appellee.**406 Bottles of Distilled Liquor,**  
Libelee.**STATEMENT OF POINTS TO BE RELIED  
UPON BY APPELLANTS IN THE CIR-  
CUIT COURT OF APPEALS AND DESIG-  
NATION OF PORTIONS OF THE RECORD  
TO BE PRINTED**

Comes now the Appellants herein, Joseph P. Boyle and Edward Haft, and designates as the points to be relied upon on its appeal to the Circuit Court of Appeals and the portions of the Record necessary to be printed for consideration of the same, the following:

1. Appellants adopt and will rely upon in the Circuit Court of Appeals, the Statement of Points to be Relied upon on Appeal, filed in the District Court.
2. The Appellants designate the entire record, as certified by the Clerk of the District Court, to the Circuit Court of Appeals as necessary to be printed for the consideration of the Appeal.

Dated at Butte, Montana, this 22nd day of September, 1944.

EARLE N. GENZBERGER  
Attorney for Appellants.

Service of the foregoing Statement of Points to be Relied upon by Appellants in the Circuit Court of Appeals and Designation of portions of the record to be printed, acknowledged and copy thereof received this 22nd day of September, 1944.

JOHN B. TANSIL  
United States Attorney  
R. LEWIS BROWN  
Asst. United States Attorney

[Endorsed]: Filed Sept. 25, 1944. Paul P. O'Brien, Clerk.